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*Plf. of Horton 148 Waggener  
for Pet.*

Supreme Court of the United States,  
*Filed Oct. 29, 1898.*  
MARCUS A. SPURR, Petitioner.

vs.

UNITED STATES, Respondent.

IN THE MATTER OF THE PETITION OF MARCUS A. SPURR  
FOR THE WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.

Brief and Argument

—OF—

JNO. A. PITTS,  
ALBERT H. HORTON,  
BAILEY P. WAGGENER,  
*For Petitioner.*

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### I.

#### GENERAL STATEMENT OF CASE.

May it Please the Honorable Court:

The petitioner was indicted in the Circuit Court of the United States for the Middle District of Tennessee, in 1893, for the false certification of checks, under the first part of the 13th section of the Act of Congress of July 12, 1882, Chapter 290, page 162, Acts of 1881-2, which is as follows:

“ Sec. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an Act entitled ‘An Act in reference to certifying checks by national banks,’ approved March 3, 1869, being Section 5208 of the Revised Statutes of the United States, . . . shall be guilty,” etc.

The pertinent portion of Section 5208, Revised Statutes, is:

“ It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.”

There were three indictments, each embracing several counts, all consolidated and tried together. They covered five checks, of different dates, running from December 9, 1892, to February 27, 1893, all drawn by Dobbins & Dazey. A sample of these counts, and one upon which the judgment of the Circuit Court is predicated, after the historical and descriptive portions as to which there is no question, is as follows:

“ He, the said Marcus A. Spurr, being then an officer—to wit, the President of said the Commercial National Bank—did wilfully violate the provisions of Section 5208, United States Revised Statutes, and did, without the consent of the bank, its board of directors and committees, wilfully, unlawfully, and knowingly certify a check drawn upon said the Commercial National Bank by said company—to wit, the said Dobbins & Dazey—they, the said Dobbins & Dazey, as he, the said Marcus A. Spurr, well knew, not having at said time on deposit

with the said the Commercial National Bank an amount of money equal to the amount specified in said check."

The case was first tried before Hon. Geo. R. Sage and a jury, resulting in a mistrial; again before Hon. W. H. Taft and a jury, resulting in an acquittal, under direction of the Court, upon all the counts based on the check of February 27, 1893, and a mistrial as to the other counts; and finally, before Hon. H. F. Severens and a jury, resulting in a verdict in the following words:

" They find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the Court."

Rec., p. 5.

The defendant's motions in arrest of judgment and for new trial having been overruled, the Court pronounced sentence of two years and six months' imprisonment upon the verdict as applied to the counts of the several indictments which were based on the check of January 3, 1893, for \$40,000. Sentence upon the other counts was by the Court deferred.

Rec., pp. 7-8.

Petitioner prosecuted a writ of error from the United States Circuit Court of Appeals for the Sixth Circuit, where the case was argued on November 17, 1897, before Judges Barr, Ricks, and Swann; and on June 1, 1898, the judgment of the Circuit Court was affirmed. A petition for rehearing having been filed, the same was denied on October 8, 1898, and petitioner now applies for the writ of certiorari to bring the case to this Honorable Court for its review.

The accompanying petition presents briefly a statement of some of the errors complained of; and it is the purpose of this brief to present others, and to emphasize those referred to in the petition as far as may be done without repetition.

## II.

### GENERAL STATEMENT OF QUESTIONS OF LAW ARISING UPON THE RECORD.

The errors assigned, in their substance, may be stated as follows:

First: The exclusion of evidence offered by petitioner of his good character for truth and veracity, after the integrity of his testimony was vigorously assailed by counsel for the government on cross-examination—the reason for such ruling being that the government had offered no evidence of his *general bad character*.

Second: The exclusion of evidence offered by petitioner of his good character for honesty and integrity down to the moment of the trial, *upon the objection of the government*.

Third: The admission, over objection, of collateral evidence of *independent and dissimilar* transactions, having no connection whatever with the offense charged, and occurring *more than six years prior thereto*.

Fourth: The rulings of the Court, in many phases, during the trial, and in the charge, and in passing upon requests for special instructions, that knowledge of petitioner of a technical violation by the cashier of the national banking law, involving no *dishonesty, untruthfulness, or moral turpitude*, would deprive petitioner of the right to rely upon the statements of the cashier in respect to the state of the Dobbins & Dazey account under his charge, even though such technical violation was many years anterior to the connection of Dobbins & Dazey with the bank.

Fifth: The ruling of the Court in the charge, in several places,

that petitioner's knowledge of the want of funds, essential to his conviction, might be *inferred* by the jury from his *duty to know the state of the account* arising from the law and the by-laws of the bank.

Sixth: The erroneous definition of a criminal false certification in the charge, in that it omitted any reference to the *intent or purpose* of the act.

Seventh: The modifying of special instructions so as to make petitioner's acquittal depend upon his belief that certain funds deposited by Dobbins & Dazey, and on faith of which he certified their checks, were not only sufficient to cover the checks certified, but *also an overdraft of which the jury might find he neither had knowledge nor was chargeable with knowledge.*

Eighth: The refusal to give in charge, or explain to the jury the meaning of, the Act of Congress upon which the indictment is based, inhibiting a *wilful violation* of Section 5208 of the Revised Statutes; and, instead thereof, reading to the jury that section in reply to their request for "the law as to the certification of checks when no money appeared to the credit of the drawer;" and telling them, in so many words, in reply to such request, that what is meant by false certification "*is the certifying by an officer of a bank that a check is good when there are no funds there to meet it,*" after having previously told them that petitioner was indicted for the "false certification" of certain checks.

The specific action of the Court and the assignments of error raising these questions will now be cited, with authorities bearing on them.

The petitioner will be hereafter referred to as the defendant.

### III.

#### EXCLUSION OF EVIDENCE OF DEFENDANT'S GOOD CHARACTER FOR TRUTH AND VERACITY.

The defendant testified as a witness in his own behalf, his direct and cross-examinations both being at great length and occupying parts of three days:

Rec., p. 78.

His direct testimony and cross-examination on several material points are set out in the bill of exceptions at pages 78 to 96 of the record. As will be there seen, the manner and substance of his cross-examination were most rigid, severe, and indeed insulting and humiliating to defendant, if it be granted that he was a man of probity and truth—a cross-examination evincing a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely and corruptly; and the record shows that in the subsequent argument of the case before the jury, counsel for the government did argue and insist that defendant “had not testified truthfully, and that his testimony was unreasonable and not worthy of belief.” And on this subject the Court, in the charge to the jury, said:

“ ‘ Nevertheless, he [referring to defendant] testified that he did not know that Dobbins & Dazey’s account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn or that there was too small a sum to their credit to meet them.

“ ‘ Gentlemen, do you think this is true? It is for you

to say, and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question.' ”

Rec., p. 98.

In order to meet this attack upon the integrity of his testimony, and in anticipation of the evident purpose of the prosecution which the sequel showed was not only carried out, but also very effectually aided by the Court itself, defendant offered evidence of his good character for truth and veracity, to which the government objected, and the objection was sustained and exception reserved. The contention of defendant and the ground of the Court's ruling is thus stated in the bill of exceptions:

“ Defendant's insistence was, that defendant had been attacked as a witness and his testimony impeached by the substance and manner of his cross-examination by counsel for the plaintiff, which had shown a purpose to argue to the jury that he had not testified honestly and conscientiously, but had testified falsely; but the Court, without determining this question, based its ruling upon the fact that there had been no attack of defendant as a witness by evidence of bad character; and held that, there having been no proof offered by the plaintiff of defendant's bad character as a witness, no proof of his good character for truth and veracity could be offered by the defense.”

Rec., p. 98.

The 19th assignment of error is based upon this action of the Court, in part, and sets out the facts fully.

Now, what strikes the mind as most remarkable, in this remarkable episode, of this remarkable trial, is the fact that the learned Trial Judge, having denied the defendant the benefit of evidence of his good character for truth and veracity, *because*, as

it was assumed, his testimony had not been assaulted, should proceed *to make that assault himself* in his charge to the jury.

It is respectfully submitted that, to the minds of an intelligent jury, language could not have been framed which would have more effectually discredited the defendant. It was so delicate, yet so pointed. “Gentlemen, *do you think this is true?*” If the Court had told the jury in plain words that the defendant, in his opinion, was a *wilful and corrupt perjurer* and had *consciously sworn falsely* when he said he did not know the account was overdrawn, the statement would not have been so forcible and impressive as the question asked, in connection with the antecedent and subsequent expressions. And yet, no witness except Porterfield, a self-confessed perjurer, had contradicted the defendant on this point; no one else had sworn that he did know of the overdraft. There was nothing else in the record to challenge his testimony, except the method and manner of his cross-examination, and circumstances which, we insist, when fairly viewed, were more forceful in demonstrating his ignorance of the overdraft than in establishing his knowledge of it.

It is true the government offered no evidence of defendant's *bad character*. It is fair to assume that no such evidence was obtainable; but after this attack was made upon him by the cross-examination, was not this evidence admissible?

We do not deny that the authorities are in conflict on this point, but we do maintain that reason, justice, and the best considered adjudications support our contention that the evidence was admissible.

The Court will bear in mind, in the first place, that this is not a case of mere contradiction among witnesses, but it is a case where the government relies chiefly upon circumstances to establish guilt and upon discrediting the defendant's testimony establish-

ing innocence; a case, too, in which defendant's testimony *must* be discredited and set aside, or his acquittal must follow in any fair trial. It is not a case where the witness may be honestly mistaken. He knew of the overdraft or he did not, and whether he did or did not no one knows so well as he. He is either innocent of this offense, or he is a wilful and corrupt perjurer. There is no third horn to this dilemma.

Now the proposition of law which we propound, and shall attempt to support, is that—

**In order to admit evidence of good character of a witness, it is not necessary that he shall be first impeached by evidence of bad character; but it is sufficient if his veracity and credit are fairly challenged by the manner of his cross-examination, or in any of the methods recognized by the law for the impeachment of a witness.**

The precise question is aptly presented and adjudged in *Richmond vs. Richmond*, 10 Yerg. (Tenn.), 345. The whole paragraph of the opinion on the point is as follows:

“ The next exception is to the introduction of certain witnesses to sustain the credit of Andrew Hamilton, who had been examined as a witness by complainant, on the ground that the character of said Hamilton had not been attacked by defendant. The record shows that Hamilton was subjected to a searching cross-examination by defendant's counsel, in which [were] many questions as to the situation of the buildings, his motives for being in the place where he witnessed the facts to which he deposed, etc., all going strongly to evince that no credit was given to his statements, and tending to make that impression on the jury. A witness may be impeached by proving that he is not worthy of credit, or that the facts to which he de-

poses are not true, or by cross-examination, in which he may be involved in inconsistencies. (3 Stark., 1853, 7-8.)

“ In this case the cross-examination was of a character from which the counsel manifestly intended to argue that the witness had sworn falsely; but, to put the matter beyond dispute, it is now earnestly argued, notwithstanding the witness has proved a good character, that this very cross-examination convicts the witness of a falsehood, and proves that he is unworthy of belief. It seems strange that, with this argument upon his lips, counsel should still maintain that the witness was not impeached. There was no error in permitting the plaintiff to prove Hamilton's good character.”

Nearly all the text-books on evidence are in accord. 3 Stark., pp. 1753, 1757, 1758:

“ The credit of a witness may be impeached either by cross-examination subject to the rules already mentioned, or by general evidence affecting his credit; or that he has before done or said that which is inconsistent with his evidence on the trial; or, lastly, by contrary evidence as to the facts themselves. . . . Where the character of a witness is impeached by general evidence, the party who calls him is at liberty to examine the witnesses as to the grounds of their belief; and *in all cases* where the credit of a witness has been attacked, either by general evidence or by particular questions put upon cross-examination, it seems that the party who called him is at liberty to support his testimony by general evidence of good character. But the mere contrariety between the testimonies of adverse witnesses, without any direct imputation of fraud on the

part of either, supplies no ground for admitting general evidence as to the character."

Mr. Greenleaf, after laying down various modes in which witnesses may be impeached, says, in Vol. 3, Sec. 469:

"Where evidence of contradictory statements by a witness, or of other particular facts—as, for example, that he has been committed to the House of Correction—is offered by way of impeaching his veracity, his *general character* for truth being thus in some sort *put in issue*, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth. So, if the character of a deceased attesting witness to a deed or will be impeached on the ground of fraud, evidence of his general character is admissible. . . . But mere contradiction among witnesses examined in court supplies no ground for admitting general evidence as to character."

2 Taylor on Ev., Sec. 1746, quotes almost literally the foregoing section of Greenleaf, and adds:

"Though if *fraud*, or other *improper conduct*, be imputed to any of them, such evidence will then be received."

1 Phil. on Ev. (5th Am., from 7th and 8th Lond. Ed.), p. 306:

"In answer to the evidence of contradictory statements, and for the purpose of corroborating the testimony of the witness, where veracity has been thus impeached, it seems reasonable to be allowed to show that he is a man of the strictest integrity and of scrupulous regard to truth."

Roscoe on Crim. Ev., p. 181:

“ The credit of a witness may be impeached, either simply by questions put to him on cross-examination, or by calling other witnesses to impeach his credit.”

This author does not discuss the question of supporting impeached witnesses at all, at least in the edition to which we have had access.

In 1 Thompson on Trials the subject is exhaustively treated. Sections 551 and 552 are as follows:

“ 551. But where the direct impeachment of a witness is attempted, it is always competent for the party whose witness he is to call other witnesses to prove that his character is good. It has even been held that this may be done where the impeaching witness testifies that the character of the witness assailed is good, the view being that the mere fact that his character is questioned by the opposite party entitles the party whose witness he is to sustain it. Where the plaintiff introduced evidence tending to prove declarations of the defendant unfavorable to the character of one of his own witnesses as to veracity, this was regarded as an impeachment of the witness' character, such as authorized the defendant to testify that his character was good. In an action on a policy of insurance, where the defendant's evidence tended to show that the plaintiff burned his own building and committed perjury in his proof of loss, it was held that evidence of his good character was admissible.

“ 552. Some American courts hold that, whenever the character of a witness for truth is attacked in any way, it

is competent for the party calling him to give general evidence of his good character for truth; and that it is immaterial whether his character is attacked by showing that he has given accounts of the matter out of court different from that given by him in court, or by cross-examination, or by general evidence of his character for truth. This latter rule has been applied where the motives of the witness were assailed on a severe cross-examination; where evidence had been admitted to contradict the witness on an immaterial point; and even where an attempt was made to discredit the witness by disproving material facts testified to by him. Where one party introduces evidence that the witness of the other party has been suborned and paid for his testimony, the party whose witness is thus assailed may, in rebuttal, introduce testimony tending to show the good character of the witness for veracity. Another American court holds that, where a witness testifies to a material fact, and the opposite party calls a witness who contradicts the former witness as to such fact, and thereupon the former witness is allowed to be sustained by evidence of good character, the contradicting witness may be so sustained."

George vs. Pilcher, 28 Gratt., 299; S. C., 26 Am. Rep., 350:

"Whenever the truthfulness of a witness is assailed either directly or by cross-examination, or by evidence of inconsistent acts or statements, or by contrary evidence as to the matters testified to by him, his reputation for truth may be sustained by direct evidence adduced for that purpose."

In Payne vs. Tilden, 20 Vt., 554, Judge Redfield said:

"It is now well settled that whenever the character of a

witness for truth is attacked in *any way*, it is competent for the party calling him to give general evidence in support of the good character of the witness; and we do not think it important whether the character of the witness is attacked by showing that he has given contradictory accounts of the matter out of court, and different from that sworn to, or by cross-examination, or by general evidence of want of good character for truth."

Sweet vs. Sherman, 21 Vt., 24; and State vs. Roe, 12 Vt., 93; and numerous cases in that State are in accord.

In Newton vs. Jackson, 23 Ala., 335, where evidence was adduced to contradict a witness on an *immaterial* point, the party who called him was allowed to prove his general good character, although the opposite party disclaimed any intention of discrediting him.

In State vs. Cherry, 63 N. C., 493, it was held competent to sustain a witness by evidence of good character, where it was sought to impeach him by the very *question* put to him.

Without quoting the cases further, we cite the following among numerous others in full accord: Davis vs. State, 38 Md., 15; Burrell vs. State, 18 Tex., 730; Phillips vs. State, 19 Tex., App., 164; Harris vs. State, 30 Ind., 131; Clark vs. Bond, 29 Ind., 555; Lewis vs. State, 35 Ala., 380; Hodjo vs. Gooden, 13 Ala., 718; Haley vs. State, 63 Ala., 83; Vernon vs. State, 30 Md., 462; State vs. Cooper, 71 Mo., 436; State vs. Pruge, 44 La. Ann., 165; Mosely vs. Ins. Co., 55 Vt., 142; Stephenson vs. Gunning, 64 Vt., 609; Isler vs. Dewey, 71 N. C., 16; Glaze vs. Whitly, 5 Ore., 164.

The evidence is admissible by many English cases. See Bishop of Durham vs. Beaumont, 1 Camp., 207-210; Provis vs. Reed, 5 Bing., 435; Annesley vs. Lord Anglesea, 17 How. St. Tr., 1348.

Although a different rule prevails in Connecticut, yet even there evidence of general good character for truth was admitted of a witness who was a stranger, residing in another State, although he was not impeached. *Merriam vs. R. R.*, 20 Conn. 354; *Rogers vs. Moore*, 10 Conn., 13.

And in New York, where the rule prevails that supporting character evidence will not be admitted until there has been an impeachment by evidence of bad character, there has been protest against such rule by some of the judges.

In *Leonori vs. Bishop*, 4 Duer, 420, Judge Duer said that if the question were an open one, he would not hesitate to hold that evidence of the good character of a witness ought to be admitted in every case in which the *veracity* of the witness, and not merely the truth of his testimony, is denied by the adverse party. We think his reasoning so sound, and so applicable to this case, that we quote from it the following paragraph:

"An attack upon the moral character of a witness is because, when successful, it creates a probability that he has sworn falsely in the testimony that he has given; and it cannot be denied that an opposite probability is created, when the character of the witness, a man of integrity and truth, is fully established. It therefore seems to me that the evidence is in its nature corroborative, and as such ought to be admitted in every case in which intentional falsehood, no matter upon what ground, is imputed to a witness. There is a fallacy in the suggestion that, when the general character of a witness has not been impeached by the adverse party, it is admitted to be good. All that is admitted is that his character cannot be shown to be positively bad, but this is no reason for excluding evidence to show that it is positively good; nor is it difficult to see that in many cases the exclusion of such evidence may be a

source of error and injustice. The relation given by a witness may be very improbable in itself, yet perfectly true; for experience attests the justness of the observation that 'truth is not unfrequently stranger than fiction.' But it is obvious that the improbability of the relation may lead a jury to discredit a witness who, if it was clearly proved to them that he was a man distinguished for his probity and strict adherence to truth, they would not hesitate to believe. It is obvious that the probability that he has sworn truly, arising from the moral excellence of his character, might very reasonably outweigh, in the minds of the jury, the opposite probability arising from the nature of the facts to which he has testified. In judging of the credit to be given to the narrative, where the facts are remarkable and unusual, we are all of us governed by the knowledge we have, or the estimate we have formed, of the moral character of the person from whom the narrative proceeds; and it is not easy to understand why the evidence that determines the judgment of every reasoning person, in the ordinary transactions of life, should be withheld from the consideration of a jury."

Other cases in that State, and in Massachusetts, Connecticut, New Hampshire, Pennsylvania, Ohio, and perhaps some others, hold either that direct evidence of bad character, or evidence of extrinsic facts going to general character, is necessary before supporting evidence of good character is admissible.

But we respectfully insist that the rule declared by the textbooks we have quoted, and by the courts of Tennessee, Alabama, North Carolina, Louisiana, Texas, Missouri, Oregon, Indiana, Vermont, and Maryland—and we have no doubt of other States to which we have not had access—is supported by the better reason, the more obvious justice, and the greater weight of authority.

#### IV.

### EXCLUSION OF EVIDENCE OF GOOD CHARACTER FOR HONESTY AND INTEGRITY.

Defendant at the same time, as will be seen from the references just given, also offered evidence of his good character for *honesty* and *integrity*, but *upon objection of the government* this evidence was limited, in time, to a date previous to the charge against him in this case. Defendant insisted upon giving this character of evidence unlimited scope, covering the entire period of his residence in Nashville down even to the moment of the trial; but the government chose to cut him off at the moment *it brought this charge against him*, and the Court so ruled.

To this ruling there was also exception, and it is likewise made the basis, in part, of the 19th assignment of error.

On this point we insist that every reason which can be urged for the admissibility of evidence of good character in a criminal case at all, supports the right asserted here, if the defendant chooses to avail himself of it and to assume the risk of putting in issue his character and standing at a period subsequent to the charge.

It is general law, nowhere questioned, that it is the *privilege* of a defendant to put his character for honesty and probity in issue or not, as he may elect. It cannot be put in issue by the prosecution. The State or government can offer no evidence upon it, until he first opens the question by himself offering such evidence. Then, and then only, may the prosecution offer countervailing testimony as to character. These are elementary and familiar principles.

Now what is the purpose of evidence of a defendant's good character in a criminal case? Why is it competent and admissible?

Said the Supreme Court in 164 U. S., just cited, quoting with approbation from an Illinois case which was an indictment for receiving stolen goods, knowing them to have been stolen:

“ Proof of uniform good character should raise a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man may repel the presumption of guilt arising from the possession of stolen goods. . . . A strong *prima facie* case was made out by the prosecution, but it was not conclusive. If the Court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised which would have resulted in his acquittal.” (P. 367.)

The authorities are agreed, as the case just quoted from states, that such evidence is *substantive*, and may itself generate a reasonable doubt. It is obviously just as true that the rational mind cannot fail to be impressed with the character of the party charged with a great crime when forming a conclusion as to his guilt or innocence, as that it cannot avoid being affected by the character of the author of an unusual or improbable narration when forming a conclusion as to the truth of that narration—so well expressed by Judge Duer in one of the cases above cited. The mental process involved is so natural as to be really involuntary, and is precisely the same in both instances. It is a question of reasonable probability. Is it reasonable that *such a man* would tell this story, if it be not true? Is it reasonable that *such*

*a man* would commit this crime? This, we submit, is the whole *rationale* of character evidence.

How, then, can it be justly said that the *strength* of character is not a material and important element? Is it to be assumed that every character which, upon the testimony of acquaintances, will pass muster as “good,” is *equally good*? Is it to be said that a shrewd adventurer who comes into a community, after a life of evil doing, and by moving in good society and deporting himself creditably for a few years and until he can steal his way into public confidence, and be enabled thereby to prove a “good character,” is to have the *same* benefit therefrom when charged with crime, as the man who has *always* lived there—whose acquaintances are the playmates of his boyhood, the companions of his youth, his daily associates for a quarter or a half century—who has built up *his* character by a long, uniform, and known course of correct and upright life, tried over and over again in the furnaces of adversity, of prosperity, of opportunity, of temptation, always coming forth without the smell of fire upon his garments, and lays that character, *with his whole life*, before the jury? It is sometimes said that character is what a man *is*, reputation is what he *appears to be*. Shall it be said that a man charged with a crime involving moral turpitude, and especially where he is sought to be convicted by mere circumstances, shall be denied the privilege of offering the *very best evidence* of the manner of man he is? What humane principle of the criminal law—and, thanks to the wisdom of the fathers, the very soul and spirit of the criminal law is *humanity*—forbids this privilege, sets bounds to it, and says to him: So much may be shown to the jury, so much shall be hidden from them? Nay, worse than that, what rule or principle of the criminal law licenses a *prosecutor*, in the name of the State, to trump up a false charge against an innocent man, publish it to the world, blacken his good name among strangers, and

then, when he offers his good character, perhaps his *only* defense, to say to him: You shall not show to the jury that that character is *strong enough* to stand, Gibraltar-like, unshaken by *this charge which I have brought against you*; you shall rest and remain under the *damaging inference* that your alleged good character is so weak that it has fallen before this accusation like a house built upon sand; you shall leave to me, for unimpaired use against you before the jury, the Satanic simile—once an archangel of heaven, yet a *devil* all the while?

Why should the *prosecutor*, or the *State*, object? Humanely, and mercifully, the law forbids the State to touch the character of the accused until he has opened it as an issue. Thus forbidden, what reason can justify the *prosecutor* or *State* in *nullifying* an important and substantial part of this privilege of a defendant?

It was urged below, and it is so held in some of the cases, that evidence of character *after* the charge is inadmissible, first, because it might *injure the defendant* by reason of the *effect* of the accusation upon his character; and, secondly, because such evidence would simply be the opinions of the witnesses upon the *fact of guilt or innocence*.

The first is wholly inapplicable where the *defendant himself* opens the question and offers evidence of his character *after* the charge, as we sought to do in this case.

The second is wholly fallacious and unsound. Testimony of the good character of a witness is not an opinion that the supported witness has testified truthfully; nor is testimony of his bad character an opinion that he has testified falsely. Testimony of the good character of an accused, *before* the charge, is not an opinion that he is innocent of the accusation; nor is testimony of his bad character, at that time, an opinion that he is guilty.

No more is testimony of a defendant's good or bad character, after the accusation, an opinion upon his guilt or innocence. It cannot be held otherwise, consistently with the admission of character evidence of any kind and in any sort of case.

We insist, therefore, that defendant should have been permitted to introduce the offered evidence of his good character down to the very moment of the trial, and that the rejection of that offer was error.

V.

ADMISSION OF EVIDENCE OF SEPARATE, INDEPENDENT, AND DISSIMILAR COLLATERAL MATTERS.

This error is treated briefly, though not fully, in the 8th paragraph of the petition for certiorari, pp. 11-15.

Attention is called to the fact that this 12th assignment is not printed in full among the assignments of error at pages 12-25 of the record. The reason is shown by the stipulation at pages 1 and 2 of the record. The failure of the printer to follow the direction of the stipulation as to paging results in some confusion, which it is proper to explain.

The paging printed, in the stipulation, is that of the original transcript, whereas the stipulation provided that the new paging of the *printed* record should be referred to. By reference to the note on page 4 of the "Detail Index" of the record, at the first of the volume, the printed pages containing the body of the assignments will be seen.

Without repeating the 8th paragraph of the petition, which.

however, should be read in connection with this argument on the 12th assignment, it is to be added—

First: That the purpose of this evidence, according to the opening statement of counsel for the government, was to show that defendant certified the checks in question "*wilfully or with bad intent to injure the bank.*"

Rec., p. 54.

Second: That the Court, in ruling upon defendant's objection to this evidence when offered, stated in substance that it was *not admissible* "for the purpose of affecting *the question of intent* by proving similar contemporaneous or near transactions;" but the Court held that it was admissible "as affecting the respondent's *right to rely on the representations made by Mr. Porterfield* [the cashier] or his assumed correctness of action and honesty of purpose;" and it was admitted for this purpose. It is also to be noted in this connection that this evidence was admitted as a part of the government's *case in chief*, and before defendant had offered any evidence that he had relied upon the statements of Porterfield.

Third: That the record shows that "there was no proof of any loss by the bank on account of these transactions of 1886 and 1887, nor of any dishonesty of Porterfield in respect to them, further than might be implied from the fact that such transactions were not authorized by the national banking law;" "that all the national banks of the city of Nashville conducted a like business for their customers, and that it was customary for national banks in various parts of the country to purchase and sell stocks for their customers, and to carry accounts with the New York brokers for that purpose, similar to the accounts proven in this case;" and that "there was no evidence tending to show that Dobbins & Dazey, or either of them, had any interest in, or any connection

with, those accounts and transactions of 1886 and 1887, or that they had any connection with the bank until October, 1891.”

Rec., pp. 61-2.

Fourth: That in the course of the trial, after evidence had been given by the government of stock purchases by the bank in 1886 and 1887 for account of defendant, Porterfield and one Cowan, assistant cashier, defendant's counsel was proceeding to show by cross-examination numerous other similar purchases for other customers on the same terms, and the commissions charged and retained by the bank for the service, for the purpose of showing that the transactions proven by the government were in the ordinary course of business, and were *bona fide* and for the profit and advantage of the bank, the Court, of its own motion, cut off the cross-examination, stating, among other things:

“ If they were in the ordinary course of business of the bank and were *illegal* and *in violation* of its by-laws [there was no by-law on the subject] or the statutes, it would not help matters if that practice was done. . . . If those transactions were of an *illegal* character, it would not help the present situation. . . . If these transactions that you are now attempting to show that Mr. Porterfield was carrying, and if he did carry them on, and Mr. Spurr knew it, I would say that their effect is neither enhanced nor impaired by the circumstance, if it should be shown that the bank was engaged in a like kind of business with respect to other customers.”

Rec., pp. 60-1.

Fifth: That the Court, although this evidence was ruled inadmissible “ for the purpose of affecting the question of *intent* ” of defendant in making the certifications for which he was being

tried, said to the jury, in the charge, concerning these transactions:

“The defendant is not on trial *directly* for his complicity with such previous speculations and misuse of the bank's property in them [by Porterfield], and proof of them has been admitted, and is to be applied by the jury *solely upon the question of knowledge and intent of the respondent when he made the false certifications of the checks mentioned in the indictment.*”

Rec., p. 78.

Sixth: That at another place in the charge, referring to these same transactions, the Court said, among other things:

“The using by its officers of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, *or any other persons*, is unlawful; their franchises do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national banks, however numerous they were, were engaged in such business, did not render it *legal*, nor can the opinion of other persons that it was proper, rightfully affect the view which the Court and jury must take of the legality of such practices. If the jury find from the evidence that *Mr. Porterfield* was engaged, with the knowledge of Spurr, in *thus* misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own *or other persons'* interest, the jury are at liberty to find *in that* a reason why Mr. Spurr *should not have confidence in Mr.*

*Porterfield's integrity and fidelity to the interests of the bank," etc.*

Rec., p. 63.

In this connection it is also to be noted that the record shows that there was proof that this bank "had been, since soon after its organization, acting as agent for its customers in making purchases and sales of stocks and bonds on New York exchange, charging commission for its service, and requiring customers for whom such purchases and sales were made to fully protect it by depositing sufficient cash or collateral securities or making notes; that this was known to and approved by the directors; that the income from commissions on such purchases and sales was large, and greatly swelled the general profits of the bank" (Rec., p. 55); and that defendant, for the security of the bank in all purchases made for him, delivered and pledged to the cashier, before the purchases were made, ample solvent securities for its full protection.

Rec., pp. 62-3.

These citations of the various actions and declarations of the Court concerning the evidence under consideration are made for the purpose of conveying as clear an idea as possible of the view which the Trial Court took of its scope, purpose, and effect, and to show the conflicting and inconsistent action of the Court on the subject.

Keeping in mind, now, what has been here shown, as well as what is said in the 8th paragraph of the petition, with the references to the record, it is apparent, first, that the transactions of 1886-7, disclosed by this evidence, were all more than five years before the certification of the Dobbins & Dazey checks by defendant, and more than four years before Dobbins & Dazey had any dealings whatever with the Commercial National Bank;

secondly, that no connection whatever was shown either of Dobbins & Dazey or of the certification of their checks by defendant with said transactions; thirdly, that said transactions, however *unlawful* they might have been, were not shown to be *fraudulent*; fourthly, that they were in no sort of sense *similar* transactions to those for which the defendant was indicted; and, fifthly, that they threw no light upon either the knowledge or intent with which defendant acted in the certification of the Dobbins & Dazey checks in December, 1892, and January and February, 1893, and hence could serve no purpose in the case except to divert the minds of the jury from the real question of defendant's guilt or innocence of the offense charged, confuse them with collateral and immaterial issues, and prejudice them against the defendant.

They should not therefore have been admitted, or, if admitted upon the statement of counsel that their fraudulent or criminal character and their connection with the offense charged would be subsequently shown, they should have been excluded from the jury when counsel failed to make good that promise.

The general rule which confines the evidence to the issues having been stated by Mr. Greenleaf, he adds, Vol. 1, Sec. 52:

“ This rule excludes all evidence of *collateral facts*, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute; and the reason is, that such evidence tends to draw away the minds of the jurors from the point in issue, and to excite prejudice, and mislead them; and moreover, the adverse party, having had no notice of such a course of evidence, is not prepared to rebut it.”

See also to same effect, the language of the Supreme Court in *Boyd vs. United States*, 142 U. S., 457-8.

In Rice on Evidence, Vol. 3, Sec. 30, it is said:

“ No evidence can be admitted which does not tend to prove or disprove the issue joined. In criminal proceedings the necessity is stronger, if possible, than in civil, of strictly enforcing the rule that the evidence is to be confined to the point in issue; for where the person is charged with an offense, it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, which alone he can be expected to come prepared to answer.”

And again, in Section 153, it is said:

“ It is indeed elementary law, that no evidence can be admitted which does not tend to prove the issue joined, and the reason and necessity of the rule are much stronger in criminal than in civil cases, for the observation of this rule and of confining the evidence strictly to the issue. The indictment is all that the defendant is expected to come prepared to answer. Therefore, the introduction of evidence of another and extraneous crime, is calculated to take the defendant by surprise and do him manifest injustice by creating a prejudice against his general character.

“ The general rule is against receiving evidence of another offense. A person cannot be convicted of one offense upon proof that he committed another, however persuasive in a moral point of view such evidence may be. It would be easier to believe a person guilty of one crime, if it was known that he had committed another of a similar character, or, indeed, of any character; but the in-

justice of such a rule in courts of justice is apparent. It would lead to convictions upon the particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses to produce conviction for a single one."

In 1 Taylor on Evidence, Sec. 298, it is said:

"Such evidence tends needlessly to consume the public time, to draw away the minds of the jurors, and to excite prejudice and mislead, and moreover the adverse party, having had no notice of such evidence, is not prepared to meet it."

In the case of *People vs. Corbin*, 56 N. Y., 363, the Court said:

"Upon the trial of an indictment for forgery, evidence of admissions on the part of the prisoner of the commission of other forgeries is inadmissible and cannot be considered by the jury in determining the question of criminal intent."

See also *Coleman vs. People*, 55 N. Y., 81.

In the case of *Bonsall vs. the State*, 35 Ind., 462, the Court, in speaking of the admissibility of evidence of other offenses, said:

"This seems to us to have been a separate and distinct offense, and we know of no rule of law by which it was admissible in support of the indictment for the larceny alleged to have been committed on the 16th. It may have very seriously prejudiced the jury against the defendant, and induced them to find him guilty. It did not support the indictment, for the money was not of the same description as that described in the indictment."

In the case of *Smith vs. the State*, 10 Ind., 106, the Court said:

“Upon an indictment for larceny, evidence is not admissible to show that the defendant has a general disposition to commit that offense; nor that he had been guilty of a similar offense; much less that he had been guilty of a felony of a different character.”

*The People vs. Barnes*, 48 Cal., 551.

In the case of *Barton vs. State*, 18 Ohio, 221, it was held that, upon the trial of the prisoner for stealing a horse, evidence that he had on the night of the day previous to that on which the horse was taken stolen some money was inadmissible. In holding that such evidence was not admissible on the question of the prisoner's intent in taking the horse, the Court said:

“Although the Court in this instance say that the evidence was only admitted for the purpose of showing the intent with which the defendant got possession of the property, yet we do not see any connection between the two transactions that would enable any legitimate conclusion to be drawn as to that fact. The only conclusion we can see that could fairly be drawn from the evidence would be that the defendant intended to steal the horses and other property with which he was charged, because he was a thief and had just before stolen a sum of money. Each case must be tried on its own merits, and be determined by the circumstances connected with it, without reference to the character of the party charged, or the fact that he may have previously committed similar crimes.”

In the case of *People vs. Sharp*, 107 N. Y., 427, the defendant was indicted for bribery. In the trial of the case in the court below, evidence was allowed to be given on the part of the prose-

cution, under objection and exception, proving a corrupt proposal made about a year prior to the offense charged, by the defendant to an engrossing clerk of the Assembly, to pay said clerk five thousand dollars to alter a certain bill in reference to street railways, which said clerk then had in his possession, so that its terms might authorize the construction of a railroad on Broadway, in said city. It was held error.

The Court, in a very lengthy opinion (see pages 456-461), condemned such evidence as greatly prejudicial to the defendant, and quoted with approval the remarks of Allen, Justice, in the Coleman case (55 N. Y., 81) upon a similar question, where it was said:

“ It was idle and frivolous to put in this evidence for the purpose avowed, while its influence could not be otherwise than damaging and prejudicial to the prisoner.”

And the Court, in the Sharp case, further said:

“ It was put in near the beginning of the trial, and the impression then made must have continued with the jury, and in their minds colored and deepened, if it did not distort, the subsequent evidence.

“ It did indeed cast a dark shadow upon the defendant's character. It not only tended very strongly to prove the defendant guilty, it was absolute proof; but it was of a different crime than that charged. It was offered and received directly on the main issue, and was of great and persuasive force against him. Such evidence is uniformly condemned as tending to draw away the minds of the jurors from the real point on which their verdict is sought, and to excite prejudice and mislead them. It was, we think, improperly received, and the exception to its admission well taken.”

In the case of *State vs. La Page*, 57 N. H., 289, this whole question of collateral facts was very fully considered by the Court, and, among other things, it is said:

“ It is a maxim of our law that every man is presumed to be innocent until he is proved guilty. It is characteristic of the humanity of all the English-speaking people that you cannot blacken the character of a party who is on trial for an alleged crime. Prisoners ordinarily come before the Court and the jury under manifest disadvantages. The very fact that a man is charged with a crime is sufficient to create in many minds a belief that he is guilty. It is quite inconsistent with that fairness of trial to which every man is entitled that the jury should be prejudiced against him by any evidence except what relates to the issue.”

And the Court quotes approvingly the following language from the case of *Regina vs. Oddy*, 4 Eng. L. & E., 572, wherein it was said:

“ On an indictment for feloniously receiving goods, knowing them to have been stolen, it is not competent for the prosecutor, in proof of guilty knowledge of the prisoner, to give any evidence that the prisoner, at a time previous to the receipt of the prosecutor's goods, had in his possession other goods of the same sort as those mentioned in the indictment, but belonging to a different owner, and that these goods have been stolen from such owner.  
... We are all of opinion that the evidence admitted in this case in regard to the *scienter* was improperly admitted, as it afforded no ground for any legitimate inference in respect of it.”

In the case of *Shaffner vs. Commonwealth*, 72 Pa. St., referred to with approval in the case of *State vs. La Page*, cited *supra*, Agnew, J., among other things, said:

“To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who committed the one, must have done the other. Beyond this obvious connection it is not only unjust to the prisoner to compel him to acquit himself of two offenses instead of one, but it is detrimental to justice to burden a trial with multiplied issues that tend to confuse and mislead the jury. The most guilty criminal may be innocent of other offenses charged against him, of which, if fairly tried, he might acquit himself. From the nature and prejudicial character of such evidence, it is obvious it should not be received, unless the mind plainly perceives that the commission of the one tends, by a feasible connection, to prove the commission of the other by the prisoner. If the evidence be so dubious that the judge does not clearly perceive the connection, the benefit of the doubt should be given to the prisoner, instead of suffering the minds of the jurors to be prejudiced by an independent fact, carrying with it no proper evidence of the particular guilt.”

See also *State vs. Renton*, 15 N. H., 174.

In the case of *State vs. La Page*, cited *supra*, in 57 N. H., 302, the Court further say:

“It is always competent for the government to intro-

duce evidence of any facts tending directly to show the evil intent, or from which such evil intent may be justly and reasonably inferred; but all proof in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the defendant, or any necessary explanation of the evidence introduced in support of the charge contained in the indictment, is irrelevant and inadmissible. (Com. vs. Tuckerman, 10 Gray, 198.) In that case the rule is laid down, that such evidence should have a peculiar and intimate, if not also an insuperable connection with, and tending to explain and characterize, the act in issue charged against the prisoner, and is only admissible on the question of intent."

And the Court laid down the proposition that—

"Evidence tending to prove collateral facts is admissible only when it has a natural tendency to establish the fact in controversy, or to corroborate other direct evidence in the case."

In the case of *State vs. Shuford*, 69 N. C., 486, the Court said:

"Evidence of a distinct substantive offense cannot be admitted in support of another offense."

In the case of *Coble vs. State*, 31 O. St., 100, the Court said:

"On the trial of a prisoner charged with an assault with intent to rape, it is error to admit testimony on behalf of the State tending to prove the defendant guilty of other assaults about the same time."

In the case of *the State vs. Boyland*, 24 Kan., 186, the opinion was written by Mr. Chief Justice Horton, and concurred in by

Associate Justice Brewer, now Associate Justice of the Supreme Court of the United States, and in that case the rule was announced, that—

“ You cannot prejudice a defendant by proof of particular acts of crime, other than the one for which he is being tried, unless the acts have been committed in the preparation for the crime or the actual doing of the crime, or in concealing it or its fruits.”

In the case of *Baker vs. People*, 105 Ill., 453, the rule is laid down, that—

“ Upon the trial of a party for one offense growing out of a specific transaction, evidence to prove a similar substantive offense, founded upon another and separate transaction, is not admissible.”

In the case of *Schaser vs. the State*, 36 Wis., 429, it was said:

“ On the trial of a person charged with a crime, it is error to admit, for the purpose of showing that he was probably guilty of the offense charged, evidence of facts tending to show that he was guilty, at another time, of some other crime.”

The Court in the opinion further said:

“ It needs no argument to show that testimony of this character was not relevant and pertinent to the issue, and that it was wholly improper to attempt to establish the guilt of the defendant in respect to the offense charged, by showing facts which tended to prove that he had probably committed another offense. And the effect of such evidence in poisoning the minds of the jury against the defendant is plain and inevitable.”

In all cases where evidence of other transactions has been admitted for the purpose of showing an evil intent, the courts have limited the introduction of such evidence to transactions immediately connected with the subject-matter of controversy. And, as said by the Supreme Court of Wisconsin, in the case of *State vs. Miller*, 47 Wis., 534:

“ It would require strong evidence to prove that crimes so dissimilar in purpose and intent were committed with a common purpose and intent, and therefore bear such relation to each other that proof of one would be proof of the intent of the other and bring the case within the rule, that offenses of like nature and intent may be given in evidence to convict of a subsequent crime, or to prove the intent of such crime, or as tending to prove such intent.”

The crime charged against the defendant is, that he *wilfully* and *unlawfully* certified certain checks of Dobbins & Dazey, drawn on the Commercial National Bank, at a time when *he knew* that there was no money on deposit with which to meet them. There can be no possible connection between such alleged offenses and the transactions of Porterfield and Spurr in 1886 and 1887; and that evidence could have served no purpose whatever, except to prejudice the jury against the defendant, and put him on trial for an offense for which he had not been indicted; and the error of admitting this class of evidence was greatly intensified when the Court told the jury, as it did in its general charge, that—

“ The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank's property in them, and proof of them has been admitted, and is to be applied by the jury solely upon the question of knowledge and intent of the respondent when

he made the false certifications of the checks mentioned in the indictment.”

Pr. Rec., p. 78.

In what possible way can it be said that because Porterfield may have engaged in the transactions of 1886 and 1887, that fact was even evidence *tending* to prove that Spurr had knowledge that Dobbins & Dazey had not sufficient means on deposit with which to meet the checks which he certified in December, 1892, and January and February, 1893? Is there any possible connection between the two transactions, such as would tend in the remotest degree to prove the knowledge or intention of Spurr at the time he certified the checks on account of which he has been indicted? The only effect of such evidence was to send the jury into the fields of speculation and conjecture, and divert them from the real issue being tried; or, as said by Mr. Chief Justice Horton, in the case of *State vs. Boyland*, cited *supra*:

“ The evidence objected to must have poisoned and inflamed the minds of the jurors, and greatly prejudiced the defendant.”

In the case of *Reg. vs. Oddy*, 5 Cox CC., 210, Lord Campbell, in substance, said that—

“ Under no enlightened system of jurisprudence can a person be convicted of one crime on proof that he has committed another. It is of the utmost importance to a defendant that the facts given in evidence by the prosecution shall consist exclusively of the transaction which forms the subject of the indictment, and which he has come prepared to answer.”

And the rule seems to be generally established, in fact to be elementary, that where evidence of other transactions is admitted;

it is upon the theory that such evidence is so intermingled and connected with the evidence tending to show that defendant committed the crime charged as to form one entire transaction.

In the case of the *People vs. Jacks*, 76 Mich., 220, where this class of evidence was admitted by the Trial Court, the Supreme Court of Michigan said:

“The testimony objected to, and which was received by the Court, tended to make him a common thief, and of the class of goods of which the jury found him guilty of stealing. This could hardly have failed to have impressed the jury most strongly against the prisoner upon the charge in the first count; and it would be impossible for us to say that the subsequent charge of the Court, to the effect that the objectionable testimony could only be taken into account in considering the second charge, entirely removed such impression, or to what extent the rights of the respondent were prejudiced thereby; and in such case, as this Court has had occasion to say heretofore, the rule of safety requires that a verdict obtained under such circumstances should not be allowed to stand against the respondent.”

See also *People vs. Jenness*, 5 Mich., 305; *Lightfoot vs. People*, 10 Mich., 507; and *Com. vs. Campbell*, 155 Mass., 537.

In the case of *Commonwealth vs. Jackson*, 132 Mass., 16, it was said, speaking of the admissibility of evidence of collateral transactions:

“Such evidence compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the one imme-

diately before it; and by showing the defendant to have been a knave on other occasions, creates a prejudice which may cause injustice to be done him. It is a well-settled principle of criminal law, that the general character of the defendant cannot be shown to be bad, unless he shall first attempt to prove it otherwise. It ought not to be assailed indirectly by proof of misconduct in other transactions, even of a similar description.”

In the case of *Smith vs. State*, 17 Neb., 358, the Court said:

“As a general rule, the guilt of the accused, or his participation in the commission of another crime wholly unconnected with that for which he is put on his trial, cannot be admitted in evidence against him.”

In the case of *Cowan vs. State*, 22 Neb., 524, the Court said:

“On the trial of the cause, the State was permitted to introduce testimony to show that the accused had in two other cases, entirely distinct and separate from that under consideration, obtained goods under false pretenses. This was entirely unauthorized, and could not fail to be prejudicial to the accused.”

In the case of *people vs. Lane*, 100 Cal., 379, the Court said:

“As a general rule, evidence of a distinct and substantive offense cannot be admitted to show the commission of another offense, and this rule excludes all evidence of collateral facts, *or those which are incapable of affording a reasonable presumption or logical inference as to the principal fact or matter in dispute*; evidence of another offense cannot be given, unless there is some clear connection between the two offenses by which it may be logically inferred that if guilty of the one, the defendant is also guilty of the other.”

The Court, in this case, quotes with approval from Wharton on Evidence, Sec. 29, wherein it is said:

“ The reason of the rule is obvious. To admit evidence of such collateral facts would be to oppress the party implicated, by trying him on a case, for preparing which he has no notice, and sometimes by prejudicing the jury against him. In criminal cases there are peculiar reasons why the test before us should be applied to proof of collateral crimes.”

In the case of *Farris vs. People*, 129 Ill., 521, in which this question was fully considered and many cases cited, the Court, after stating that testimony which is relevant to the issue is not to be excluded because it tends to prove the commission of another crime, said:

“ But the general rule is against receiving evidence of another offense, and no authority can be found to justify its admission, unless it clearly appears that such evidence tends in some way to prove the accused guilty of the crime for which he is on trial.”

The Court further said:

“ It is the general rule that in all cases, civil or criminal, the evidence must be confined to the points in issue; but there is a greater reason for strictly enforcing the rule in criminal cases than in civil cases.

“ No fact, which on principles of sound logic does not sustain or impeach a pertinent hypothesis, is relevant, and no such fact should therefore be admitted as evidence on the trial, unless otherwise provided by some positive prescription of law.

“ This rule excludes all evidence of collateral facts, or those which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute, for the reason such evidence tends to draw away the minds of the jurors from the point in issue, and excite prejudice and mislead them, and because the adverse party, having no notice of such evidence, is not prepared to rebut it. . . . To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor by a connection which shows that he who has committed the one must have done the other.”

In the case of *People vs. Hill*, Supreme Court of California, 34 Pac. Rep., 854, it was said:

“ On a prosecution for embezzlement, evidence that defendant two months after the offense charged in the information, embezzled another sum of money from plaintiff, is not admissible to show his intention in taking the first sum.”

In the case of *State vs. Bates*, reported in 15 Southern Rep., 204, the Supreme Court of Louisiana said:

“ It is a rule, subject to special exceptions, that when a person is on trial for one offense, evidence of another and extraneous crime is inadmissible. Such evidence is dangerous, and calculated to lead to conviction, upon a particular charge made, by proof of other acts in no way connected with it, and to uniting evidence of several offenses in order to produce conviction for a single one.

“To make one criminal act evidence of another, a connection between the two must have existed, linking them together. If the Court does not clearly perceive the connection between the two offenses (as to the commission of both of which evidence is tendered), it should give in the special case the benefit of the doubt to the prisoner.”

For the purpose of showing intent or guilty knowledge, evidence of other offenses may be received; but under such circumstances the universal rule is that—

“To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish.”

In the case of *Beach vs. State*, 11 S. W. Rep., 832, the Court of Appeals of Texas said:

“On trial for theft, evidence of another theft committed by defendant, but not shown to have been committed at the same time and place, is inadmissible.”

In the case of *State vs. Kelly*, 27 Atlantic Rep., 203, the Supreme Court of Vermont said:

“On a trial for larceny, evidence of an accomplice, that after the return of himself and defendant to the latter's home with the stolen goods, they went out the same night and stole other goods, is inadmissible.”

In the case of *Whitlock vs. State*, 6 Southern Rep., 237, the Supreme Court of Mississippi, in passing upon the relevancy of evidence of this character, said:

“The general rule is, that the evidence must be con-

finer to the issue, and that on the trial of a person for a particular offense, the State cannot aid the proof against him by showing that he committed other offenses. The reason and justice of the rule is apparent. Such evidence tends to divert the minds of the jury from the true issue, and to prejudice and mislead them; and the defendant, being informed by the charge against him that he is to be tried for a specific offense, is not prepared to defend against other offenses. 'To admit such evidence,' says Bishop, 'would be to put a man's whole life in issue on the charge of a single wrongful act, and crush him by irrelevant matter, which he could not be prepared to meet.' "

Numerous other cases on the subject are cited and quoted in 3 Rice on Ev., Chap. 25, Secs. 153-158, to which attention is invited.

A careful consideration of the authorities therein and herein cited will, we believe, demonstrate that there was error in the admission of this evidence.

The 17th assignment of error is of the same character, but relating to certain personal accounts of speculative transactions, not connected with the bank; but it presents the same legal question, to which the foregoing argument is equally applicable, and need not be discussed further.

VI.

RULINGS OF THE COURT UPON THE EFFECT OF  
COLLATERAL MATTERS.

Of a kindred nature to the question just argued is that stated generally in the above heading. Some of the rulings here referred to were stated in the 5th division of this argument. That which contains the instruction to the jury upon the *illegality* of the cashier's dealing in stocks, etc., in the name of the bank, for its customers, and the effect thereof upon defendant's right to rely upon the cashier, has already been quoted, and is the basis of the 13th assignment of error.

Rec., p. 19.

Others will now be cited, but it is proper first to call attention to the following facts appearing by the record:

First: That there was evidence tending to show, and from which the record recites the jury might have found, that defendant did not at any time purchase through the bank any stocks jointly with Porterfield; that defendant did not know that Porterfield was purchasing stocks through the bank, or that he was speculating in the name of the bank, or that he was using its funds in speculations, either for himself or others, without the bank being first amply secured by the deposit of funds or collaterals; that defendant believed Porterfield was honest, truthful, and faithful to the bank, and was fully protecting its interests in all matters under his control as cashier; and that he and all the officers and directors of the bank relied implicitly upon Porterfield's statements respecting its affairs.

Rec., p. 62.

Second: That there was evidence tending to show, and from which the record recites the jury might have found, that defendant had no knowledge of the overdraft of the Dobbins & Dazey account; that he did not have charge of the account, nor of any of the books of the bank, and that this account was never referred to him for any purpose; and that in making the certifications of the checks of Dobbins & Dazy, he acted, in good faith, upon information given him at the time, either by the cashier, Porterfield, or the exchange clerk, that ample funds were on deposit to meet the checks, which information he believed to be true.

Rec., pp. 31-2; 46-7.

Third: That there was no evidence offered by the government to show that the parties for whom the bank, through Porterfield, made the stock purchases in question, of 1886-7, did not furnish means to secure and protect the bank against loss in respect to them, nor that the bank sustained any loss whatever by them (Rec., p. 61); but, on the contrary, the government contented itself with proof that such purchases were made, commissions charged for them, and exchange sent on to New York by Porterfield to the brokers to cover them. Whether the parties for whom the stocks were bought furnished the money to the bank or not was apparently deemed wholly immaterial by both the Court and counsel for the government.

Now, in this state of the case, defendant asked the Court, by the 13th special request, to instruct the jury, in substance, that although a national bank had no authority by law to receive and execute orders for such purchases as were shown in this case, yet if it was done with the approval of the directors and for the profit of the bank in commissions, and the bank was fully secured, and the defendant had no knowledge of, or reason to suspect, the *unfaithfulness* or *dishonesty* of the cashier in his conduct of such transactions, he "ought not to be prejudiced, *in this case*, by the

fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account if he secured the bank amply with his own means as other customers were required to do."

Rec., pp. 63-4.

This instruction was refused, and its refusal is the basis of the 14th assignment of error.

Rec., pp. 19-20.

Defendant also asked the Court, by the 10th special request, to instruct the jury, in substance, that if defendant relied upon the statements of the cashier as to the condition of the Dobbins & Dazey account, in good faith, believing those statements to be true, he would have the right to do so "if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and *truth*." The Court granted the instruction after striking out the word "truth," and substituting therefor the words, "right conduct as respects the bank's affairs."

Rec., p. 64.

To this modification defendant excepted, and it is the basis of the 15th assignment of error.

Rec., p. 20.

Changes of the 11th request for special instructions, made the basis of the 16th assignment of error, indicate the same conception or idea in the mind of the Court, namely, that it was not the known or supposed *truthfulness* or *honesty* of the cashier that was the test of defendant's right to rely upon his statements, but his *right conduct* in respect to the bank's affairs, in the sense of *lawful* conduct; for in the 11th special instruction the change made by the Court was, in part, to strike out the word "dishon-

estly," and substitute for it the words, "*unlawfully* in respect to its affairs."

Rec., p. 65.

Recapitulating briefly the rulings of the Trial Judge on this subject, we have the Court's position and view upon it shown—

First: By his statement when the evidence was admitted that it was competent "as affecting the question of respondent's right to rely on the representations made by Mr. Porterfield, or upon his assumed correctness of action or honesty of purpose."

Rec., p. 56.

Second: By his subsequent ruling, during cross-examination of a witness, that such purchases being *unwarranted by law*, the fact that they were in the ordinary course of the business of the bank and for its benefit was not material and "would not help matters."

Rec., pp. 60-1.

Third: By the direct charge quoted in previous division of this argument, to the effect that such transactions are *unlawful* and an *abuse of the lawful powers of the bank*, and that if the defendant had knowledge of such *violation of law* by Porterfield, the jury might treat *that* as a ground for denying him the right to rely on Porterfield's statements concerning the Dobbins & Dazey account.

Rec., p. 63.

Fourth: *By the refusal* of the 13th special instruction, to the effect that if defendant acted honestly in the matter, and had no knowledge of, or reason to suspect, the unfaithfulness of the cashier, and these *unlawful* transactions were authorized by the directors, the defendant ought not to be prejudiced, *in this case*,

by the fact that the bank conducted such business, notwithstanding it may not have been within the lawful powers of the bank.

Rec., pp. 63-4.

Fifth: By striking from the 10th special instruction the word "*truth*," and substituting "*right conduct* as respects the affairs of the bank;" and by striking from the 11th special instruction the word "*dishonestly*," and substituting "*unlawfully* in respect to its affairs."

Rec., pp. 64-5.

Now we maintain that each and every one of these rulings of the Court was erroneous, and that the idea which underlies and pervades all of them is an essentially erroneous conception of the law applicable to this subject in a criminal case.

It is beyond doubt that this idea of the learned Trial Judge, thus put forth in so many forms, was that the defendant's knowledge of the *technical violation* of the national banking law by the cashier, in acting as agent for the customers of the bank in purchasing stocks on margin, however honestly and innocently, and however faithfully he might thereby be serving both the wishes of the directors and the interests of the bank, would *deprive the defendant* of the right to rely on anything the cashier might say concerning the affairs of the bank under his special charge; and such, unquestionably, was the impression he left upon the minds of the jury.

The evident purpose was to induce the jury to find that although the defendant *honestly acted upon the cashier's statements* that the necessary funds were on deposit, *in the belief that such statements were true*, yet, nevertheless, as he knew the cashier had acted *unlawfully* in making purchases in the name of the bank which by law the bank *had no power to make*, he was to be

*deprived*, or might be, by reason of this fact, of the *right to rely* on the cashier's statements, though wholly disconnected with the "illegal" transactions, and in this way the proof of defendant's *actual innocence* and *honesty* be gotten rid of and the defendant placed in an attitude to be *charged with a knowledge* which the proof showed he did not possess. It was an effort, in other words, to bring the defendant within the doctrine of certain cases which hold that wilfully and designedly shutting the eyes to obvious facts is equivalent to knowledge of those facts—a class of cases which we do not question when properly applied.

Our contention was, and is, that the defendant could not be deprived of the right to rely upon the cashier's statements in respect to this Dobbins & Dazey account unless it was shown that he had knowledge of the cashier's *untruthfulness*, *dishonesty* or *want of integrity*, or his *unfaithfulness to the bank*; and that his knowledge of such a *technical violation* of the lawful powers of the bank as that put by the proof and instructions of the Court would no more have that effect than would knowledge of the fact that the cashier had loaned money at excessive rates of interest; or had loaned more than one-tenth of the capital stock to one person, firm or corporation; or had made loans on real estate as security, or the like—in fact, the latter acts would be the more serious violations, for they are *expressly forbidden* by law, while acting as agent for the purchase of stocks and securities on margin is not expressly forbidden.

Our position is well sustained by the authorities, and none have been cited to the contrary by the government at any time in the many trials of this case.

Said Lord Moncreiff in the Trial of the Directors of the City of Glasgow Bank, pp. 433-4:

"A director is generally a man who has other avocations to attend to. He is not a professional banker. He is not expected to do the duty of a professional banker, as we all know. He is a man selected from his position, from his character, from the influence he may bring to bear upon the welfare of the bank, and from the trust and confidence which are reposed in his integrity and in his general ability. But I need not say that it is no part of his duty to take charge of the accounts of the bank. He is entitled to trust the officials of the bank who are there for that purpose, and as long as he has no reason to suspect the *integrity* of the officials, it can be no matter of imputation to him that he trusts to the statements of the officials of the bank acting within the proper duties of the department which has been entrusted to them."

Said Vice Chancellor McCoun, in *Scott vs. De Peyster*, 1 Edw. Ch., 513-4, cited in *Briggs vs. Spaulding*, 141 U. S., 162, referring to the president and directors of moneyed institutions and their secretary, cashier, or other subordinate agents:

"While engaged in the performance of the general duties of their station, they (the subordinates) must be supposed to act *honestly* until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of *integrity*, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued."

This is laid down as the measure of responsibility in a civil action where only pecuniary liability is involved. Certainly a more rigid rule ought not to be applied in a criminal case involving the liberty of the citizen.

Again, on the same subject, the following language of Judge Earl, in *Wakeman vs. Daley*, 51 N. Y., 27, was quoted with approval by Chief Justice Fuller in *Briggs vs. Spaulding*, 141 U. S., 163:

“The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no *fraud*, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their *fidelity*. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.”

The case upon which the government has always specially relied in these trials, on this point, is that of the *United States vs. Graves*, at the circuit, reported in 53 Fed. Rep., 634. The paragraph of the charge of Judge Woolson on this point will be found on page 658, and is as follows:

“Notice, gentlemen, that in all the instances I have named I have given prominence to the fact of knowledge in the person doing the act. I do not mean that a man can be convicted of the crime charged in this indictment

for mere negligence, careless action. Speaking generally, I may say that, if the director making the false entry was in fact ignorant of the condition of the bank, and did not know its resources and liabilities, however recreant he might be to the position he held and the duties devolving upon him, and whatever other liabilities, civil or criminal, he might thereby be subject to, he could not be convicted under the section on which this indictment is based; and yet I ought to add that this does not in any wise justify or authorize a director to purposely, wilfully, and knowingly close his eyes and his ears to the facts around him, or which lie directly in his path, for the purpose of making it easier to those engaged in plundering or wrecking a bank. Let me illustrate my meaning: If a director of a national bank, knowing that those in charge of or actively managing the bank are *despoiling it, robbing its treasury*, knowing that the funds of the bank are being *dissipated, improperly withdrawn from the bank*, and worthless paper (miscalled 'securities') is being substituted instead thereof—if, *thus knowing*, such director *refuses to accept* the information lying directly across his path, and *purposely* keeps himself in ignorance or refrains from taking active part in the bank's management, that he may thereby permit such transactions to go undisturbed or undetected, and he then lends the credit of his name, puts his signature to untrue and false reports connected with the condition of the bank *for the purpose of enabling such a fraud to go undetected*—in such a case it will be no shield to him to show that he had no knowledge of the truth or falsity of the report he has signed. To hold otherwise would be to make the law go hand in hand with rankest injustice, to legalize robbery, to make our temples of justice modern cities of refuge, and our courts encouragers of what plain people properly call crime."

Now by all these authorities—and none going further have been produced by the very able counsel for the government—the thing which is to arouse suspicion of their subordinates on the part of the superior officers and directors is the *want of integrity* of such subordinates, however the idea may be expressed. And this, too, even in a civil action. If we are to be guided by the Graves case, most relied on by the government—a criminal case, too—then the directors or superior officers must *know* “that those in charge of or actively managing the bank are *despoiling it, robbing its treasury*, that the funds of the bank are being *dissipated, improperly withdrawn from the bank,*” etc.

The position of the Court on this question affords one of the many illustrations of the dominant erronecus theory that permeates the whole case, as will be seen further on, namely, that the defendant might be convicted upon a lot of *inferences* and *presumptions* arising from his *duty* and from extraneous circumstances having no relation—certainly no obvious or proven relation—to the crime charged, and in this way the burden of *proving* the facts essential to guilt be obviated.

VII.

GUILTY KNOWLEDGE AND INTENT, AND THE IN-  
FERENCE OF KNOWLEDGE FROM DUTY  
AND FROM THE CONTENTS OF THE  
BANK'S BOOKS.

Under this heading may be treated the 5th and 6th subjects stated, generally, at the beginning of this argument.

The Trial Judge, in the charge, *defined* the offense as follows:

“The government is bound, in order to maintain any of the counts in these indictments, to prove:

“First: That the defendant certified the check.

“Second: That the drawers of the check had not sufficient funds in the bank to meet such check.

“Third: That the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained and its modification stated further on.”

Rec., p. 50.

This clause of the charge is the basis of the 6th assignment of error.

Rec., p. 15.

The succeeding paragraphs of the charge, embodying the explanation and modification referred to, were as follows:

“Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawers was overdrawn when these

certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks.

“ The knowledge of the defendant of the state of Dobbins & Dazey’s account when he certified the checks is thus made the pivotal question in the case. Upon this question of knowledge the Court charges you that it is not necessary for the government to show that the defendant knew of the lack of funds of Dobbins & Dazey from an actual examination of the books at that time or from any inquiries made at that time. If the defendant knew that he had good reason for believing Dobbins & Dazey’s account to be overdrawn and refrained from making such inquiry for the reason that he knew the condition of the account or because he was purposed to certify the check without reference to whether there were funds sufficient to meet it or not, that is sufficient. That is to say, if he shut his eyes to what he believed was the fact, and kept himself in ignorance of the state of the account because he believed an examination would disclose the facts, this would be equivalent to express knowledge. Nor is it necessary to prove that the defendant knew just what was the extent of the overdraft on Dobbins & Dazey’s account or of the lack of funds to meet the checks. If he knew of the substance of the fact that Dobbins & Dazey had no funds there to meet their check, and that there was no warrant for marking the check ‘ Good,’ that was sufficient.”

The Court then, after a paragraph not excepted to, and containing nothing in the way of a definition of the offense, proceeded to say:

“These checks, before their certification, were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. *It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it; but the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And, in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty.*”

Rec., pp. 149-150.

The portion in Italics is the basis of the 1st assignment of error.

Rec., p. 13.

Subsequently, after granting the 2d special instruction asked by defendant, construing By-laws 8 and 9 relative to the duties and responsibilities of the president and cashier (pp. 38-9) to the effect, among other things, that these by-laws required that these officers should each “faithfully and honestly” discharge their respective duties, the Court added:

“But the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and I further charge you that *when the president assumed to certify these checks as*

*good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."*

To this modification exception was taken, and it is covered by the 5th assignment of error.

Rec., pp. 14-15, 39.

The 4th special instruction was also subsequently refused, and which was as follows:

*"If you believe from the proof that the management of the details and accounts of the bank was entrusted specially to the cashier, and not to the president, and that the cashier was directed by the Executive Committee of the bank to look specially after the account of Dobbins & Dazey, and that it was not at any time referred to or placed in the hands or under the charge of the defendant, nor his attention called to it, and that he was assigned to other duties, then no inference of the defendant's knowledge of the state and condition of that account should be drawn from the mere fact that the account appeared on the books of the bank to be overdrawn, for knowledge of the contents of the books cannot be imputed to the defendant simply because he was president or director."*

This refusal was excepted to, and is the basis of the 3d assignment of error.

Rec., pp. 13-14, 33.

The Court also refused the 9th request for special instructions, which was as follows:

*"The defendant's want of knowledge of the state of the account of Dobbins & Dazey, at the time he certified the checks, will be a complete defense to him, unless you are*

satisfied beyond a reasonable doubt that such want of knowledge *proceeded from a will to disobey the law or from an indifference to its commands.*"

This refusal was excepted to, and is the basis of the 10th assignment of error.

Rec., pp. 17, 52.

After charging the jury, as stated in the quotation above, to the effect that they might *infer* defendant's knowledge of the state of the account *from his duty to know it*, but that *the presumption* was not conclusive, and that *he might show, if he could*, that he did not, *in fact, acquire information of the truth*, the Court used the following language (p. 98), already quoted in another connection:

"Nevertheless, he [referring to the defendant] testified that he did not know that Dobbins & Dazey's account was overdrawn when he certified these checks, or any of them, or that there was a lack of funds in the bank to pay them, and that he had no reason for supposing this account to be overdrawn, or that there was too small a sum to their credit to meet them.

*"Gentlemen, do you think this is true? It is for you to say; and as you are responsible for the answer, I shall do no more than challenge your serious attention to the evidence in the case touching this question."*

The Court also refused the 6th special instruction, to the effect that it was incumbent on the government to show that the defendant *actually knew*, at the time he certified the checks, that the drawers had not sufficient funds in the bank to meet them, "and that he certified them *wilfully and with such knowledge.*"

Rec., pp. 33-4.

This refusal was excepted to, and is the basis of the 4th assignment of error.

Rec., p. 14.

We cite these several actions of the Court together because they color and reflect upon each other, and because each tends to show, and all together conclusively show, what we submit was the fundamental error that dominated the mind of the learned Trial Judge throughout the case, and by which alone the government was enabled to obtain a verdict, namely,

**That guilt might be established, in some round-about way, by inference from the defendant's duty under the law and the by-laws of the bank, and from the contents of the bank's books, without showing any actual, conscious guilty knowledge, or any wilful or fraudulent avoidance of knowledge, or any bad intent or purpose on the part of the defendant on trial.**

In other words, that the Court erroneously applied to the case the rules and principles of *civil* responsibility, and not those of the *criminal law*.

1. Now the Court, in the first above-quoted extract from the charge, undertook to *define* the offense as consisting of (1) certification, (2) want of funds, and (3) knowledge of want of funds, adding that the third element of the offense would be "explained and its modification stated further on."

Our objection to this definition is that it omits or ignores the essential *bad intent* of the act, declared by this Court in *Potter vs. United States*, 155 U. S., 438. The learned Court of Appeals concedes that this objection would be good "if the instruction had been submitted as *complete in itself* upon the essentials of the crime, and as *dispensing with the necessity of proof of the intent which accompanied the act of certification.*"

Rec., p. 115.

But the Court adds:

“ But the last paragraph clearly excluded that view of its design and scope. Its promise was fulfilled in the passages in the charge quoted in our review of the 6th request. These, in connection with the extract criticised, defined fairly the essentials of the offense and the degree of proof required upon the questions of knowledge *and intent*.”

Rec., p. 115.

If this answer to our objection is well based in point of fact, then, of course, there is nothing further to be said.

Inasmuch as this position of the Court of Appeals is the only one for which the government has contended on this point, and as it conceded in its opening statement and throughout the trial, as the record abundantly shows, the necessity of proof of the *bad intent* implied by the use of the word “ wilfully ” in the statute, this question as to the omitted essential of the offense being supplied subsequently in the promised explanation and “ modification of the third element,” is vital to the case and deserves full consideration.

Now this position of the government and of the Court of Appeals, simply and fairly stated, seems to be this: That the instruction criticised gives a definition of the offense which is defective and erroneous as it stands, unless there is added, in the promised *further* explanation and modification, a definition or declaration of the *intent* with which the act was done, superadded to *knowledge of the want of funds*, which *intent* is an essential part of the crime, and must also be proven to warrant conviction.

Let us, then, inquire whether this omitted essential element of the offense is subsequently supplied. We confidently maintain that it is not; and that, on the contrary, the Trial Judge *did not*

*purpose or intend* by his promised explanation and modification to add any such further element or feature as essential to the offense; but his purpose was to modify and minimize the element of *knowledge*, and to relieve the government of the necessity of proving even that.

It will be observed, first, that the learned Trial Judge does not, in the definition quoted, suggest that there is any *additional* element of the offense beyond the three elements stated; and, we submit, the whole charge will be searched in vain for any such suggestion. He divides the offense into *three* elements, and suggests that the *third* is subject to an *explanation* and *modification* to be stated further on. It is doing violence to the language of the learned Judge to say that he did not mean what he said—that *three* things were to be established to warrant conviction, *one* of which was subject to a certain *explanation* and *modification* which would be given later on. This is the plain meaning of his language, and it cannot be argued away.

Secondly. It will be observed from the succeeding paragraphs of the charge that the learned Judge, after stating that the first and second elements of the offense are not denied, and that the third is denied, adds: "The *knowledge* of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case." Why *pivotal question*, if not the *only* disputed question upon which the right to convict turned? Here, again, we get a clear insight to what was in the mind of the Court, as well as to the meaning his language carried. It was equivalent to saying to the jury: The *whole case* depends on whether the defendant *had knowledge* of the state of the account when he certified these checks; *if he had such knowledge, you may convict him*, as he does not deny that he certified the checks, nor that the funds were, in fact, wanting.

It would seem unnecessary to go further to find that this is what

the Court really meant, and this is certainly the plain and natural meaning of his words.

But did he, in fact, go further and add the omitted element, *intent*, in his promised further instructions, or did he simply *modify* and *explain the element of knowledge*?

The Court then takes up his promised modification and explanation in the very next paragraph, beginning with the words, "*Upon this question of knowledge* the Court instructs you," etc., quoted fully above, and tells the jury, in substance, that it is *not necessary* for the government to show knowledge directly; that if defendant "knew that he had good reason for believing" the account overdrawn, and refrained from making inquiry, etc., "*that is sufficient*;" that "if he shut his eyes to what he believed was the fact, and kept himself in ignorance," etc., "this would be *equivalent to express knowledge*;" that it was *not necessary* to prove that he knew the extent of the overdraft, etc.; that "if he knew of the substance of the fact," etc., "*that was sufficient*."

Sufficient for what was all this? Undoubtedly, sufficient to *charge* the defendant with *knowledge of the want of funds*, and meet the requirement of the government as to the third element of the offense, although the government should not be able to show actual knowledge.

Now this is, in fact, what the Court promised—an *explanation* and *modification* of the "last element of the offense;" and the obvious purpose and effect of it was to *relieve* the government of the burden of showing directly actual knowledge, as might be implied from the original definition of the offense unexplained and unmodified. Instead of adding to the burden of the government the necessity of *proving a criminal intent*, superadded to knowledge of the want of funds, the promised modification *relieves* the government of the necessity of proving, directly, even that knowl-

edge, and *explains* to the jury how *that fact* may be shown *indirectly, constructively, and by inference or presumption.*

That this is all of the charge that was meant and intended by the Court as a modification of the "last element of the offense" we think cannot admit of doubt; but the Court of Appeals, in their opinion, say the promise of the Trial Judge to add the omitted element of *intent* was fulfilled in the passages in the charge quoted in its review of the 6th request. (Rec., p. 115.) That learned Court quotes in its review of the 6th request the paragraph herein above quoted, giving the equivalents of knowledge, and also the following additional extracts:

(1) "The government is bound, in order to maintain any of the counts in the indictment, to prove: . . . 3d, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them [the checks]."

(2) "You must be satisfied from the proof, beyond a reasonable doubt, of every fact essential to the guilt of the defendant, of the specific charges contained in the indictment, before you will be warranted in convicting him."

(3) "The facts which are charged as constituting guilt must be so proven as to persuade a clear and abiding conviction of defendant's guilt, such conviction as is not shaken by any reasonable doubt grounded upon the testimony. If you are so convinced of his guilt, he should be convicted; otherwise, not."

(4) "And, in general, if the defendant acted in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by bad faith, would not render him guilty."

(5) "If the proof fails to satisfy your minds clearly and beyond a reasonable doubt that the defendant did actually know, at the time he certified the checks mentioned in the indictment, that Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he wilfully, designedly, and in bad faith [these words mean substantially the same thing] shut his eyes to the facts, and purposely refrained from inquiry and investigation for the purpose of avoiding knowledge."

Rec., pp. 112-114.

It must be obvious to the Court that these latter extracts from the charge and special requests granted did not, and were not intended to, supply the omitted essential of criminal *intent* in the act of certification. They are, for the most part, fragmentary excerpts, in no way connected with the Court's definition of the offense charged. The first is simply a part of the definition under criticism; the second, simply a general statement that the essential facts must be proven beyond a reasonable doubt, and is taken from the latter part of the defendant's 16th special request (Rec., p. 154); the third, similar to the second, is taken from the concluding lines of the charge (Rec., pp. 156-7); the fourth is a segregated extract from a paragraph of the charge to the effect that the jury might infer defendant's knowledge of want of funds from his duty to know the state of the account, elsewhere criticised (Rec., pp. 149-50); and the fifth is the defendant's 8th special request, modified and granted (Rec., p. 153).

And so, it is confidently insisted, the learned Circuit Judge neither intended by his promised explanation and modification of the last element in his definition of the offense to add the omitted criminal *intent*, nor did he do so in any part of the charge. This

will be still more apparent, as we proceed, from other statements and declarations in the charge and in the action of the Court on special requests, showing that he *did not regard any criminal intent necessary*.

2. The instruction quoted and Italicized at the beginning of this division of the argument, as the basis of the 1st assignment of error, came almost immediately following the definition of the offense just commented on. This was to the effect, as has been seen, that from the existence of the *duty* of the defendant to *know the state of the account* before certifying the checks the jury might draw the *inference of fact that he did know it*, but that this "*presumption of knowledge*" was not an *absolute* one—that the *defendant might show*, if he could, that he did not, *in fact, acquire information of the truth*.

This, as we shall presently attempt to show, was an unwarranted shifting of the burden of proof, as to knowledge, from the government to the defendant, and an application to the case of a rule or principle which obtains only as to civil responsibility, and has no place in the criminal law.

But it is proper to notice, in the same connection, the three succeeding quotations from the record, indicating similar action of the Court, involving a similar misconception of the law, and intensifying and emphasizing the error complained of in the 1st assignment.

The purpose of the 2d special request, as will be most manifest from a reading of the record, was simply to have a construction of By-laws 8 and 9, defining the duties and responsibilities of the president and cashier, in corroboration of the evidence offered on behalf of defendant to the effect that it was understood and agreed from the first that *he* was not to have charge of the books, accounts, and details of the bank, but was to look only after out-

side matters and such as might be specially referred to him, and as tending to make reasonable his contention that he did not know the condition of the accounts on the books; that it was not his duty, as he understood it, to look after them; but that it was the cashier's duty, and the president was well warranted in relying upon inquiries made of the cashier as to such details. This was most obviously the only purpose of this request; but the Court, after granting it and stating its conclusion that these by-laws required of these officers "to faithfully and honestly discharge their respective duties," added:

" . . . When the president assumed to certify these checks as good, the *faithful and honest* discharge of his duties *required* him to be informed of the condition of the account on which they were drawn."

This could not be otherwise understood than as equivalent to saying that the very by-laws of the bank *held the defendant to knowledge of the condition of the account* when he *assumed to certify checks drawn upon it*.

And so, thus far, we have the Court saying, first, that it was the defendant's *duty*, presumably under the law, to know the condition of the account when he certified checks drawn upon it, and that from that duty the jury might *infer that he did know it*—leaving to the defendant the privilege of showing, if he could, that he did not, *in fact*, know it; and, secondly, that the faithful and honest discharge of his duties, exacted by the by-laws of the bank, *required him* to know it.

And then, when the defendant asks a special instruction (the 4th), to the effect that if the details of the bank were entrusted specially to the cashier, and not to the defendant, and the Dobbins & Dazey account was not at any time referred to defendant nor his attention called to it, and he was assigned to other duties,

then *no inference of his knowledge of the state of that account* should be drawn *from the mere fact that it appeared on the books to be overdrawn*, for knowledge of the contents of the books *could not be imputed to the defendant simply because he was president or director*, the Court refuses the instruction.

And, again, when the defendant asks an instruction (the 9th), to the effect that his *want of knowledge* of the state of the account would excuse him, unless such want of knowledge proceeded from a *will to disobey the law*, or from an *indifference to its commands*, the Court *refuses that*.

And, finally, on this point, after having told the jury that the defendant *might show*, if he could, that he did not, *in fact*, acquire information of the truth, and in that way *rebut the presumption* which they were authorized to draw *from his duty to know it*, the Court says to them that defendant has testified that he did not know it, and adds, with ominous significance:

“Gentlemen, *do you think this is true?* It is for *you* to say; and as *you* are responsible for the answer, *I* shall do no more than *challenge your serious attention to the evidence in the case touching this question.*”

Now with the greatest respect for the learned Circuit Judge, we submit that the annals of criminal trials in modern times will be searched in vain for a more striking example of *unfairness*, to say nothing of the apparent negation and nullification here exhibited of the humane doctrine of the criminal law which holds the *intent*—the conscious guilty knowledge and purpose, the heart devoid of social duty and bent on mischief—the chief element of crime.

On the essentiality of a bad intent, a purpose to do wrong, as an element of the offense charged in this case, the case of *Potter*

*vs. United States*, 155 U. S., 438, is deemed sufficient. Referring to the meaning of the word "wilfully" as used in the Act of Congress of 1882, the opinion in that case says:

"It implies on the part of the officer knowledge *and a purpose to do wrong*. *Something more* is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact *or* without any purpose to evade or disobey the mandates of law."

The opinion quotes approvingly other authorities holding that the word "wilfully" in criminal statutes implies "*a determination with bad intent*;" "not merely voluntarily, but *with a bad purpose*;" "*an evil intent* without justifiable excuse;" and that "*the gravamen of the offense consists in the evil design*."

The same principle is declared in many other authorities. It is most excellently stated by Lord Moncreiff in the Trial of the Directors of the City of Glasgow Bank, which was an indictment for signing and publishing certain false statements or balance sheets of the bank, *knowing them to be false*—the word "wilfully" not being used. At page 82 of the report of the trial the following language occurs:

"My general opinion upon the matters submitted for discussion yesterday is, that it is not every violation or excess of the rights of directors or persons in that position of trust which will ground a criminal prosecution. It may quite well be that directors violate the conditions on which they hold their office by doing acts which are not sanctioned by the terms of their appointment. Such cases occur every day in the civil courts; and if directors in that position act beyond their powers, or in violation of their powers, they will be responsible in the civil consequences, and their acts will not have the validity of

legal acts of the directors. But before this can be raised into a criminal offense, and be the subject of a criminal indictment, there must be superadded to the illegality of the act—the invalidity of the act—some element of bad faith, some corrupt motive, some guilty knowledge, some fraudulent intent, which shall raise that which, although illegal, was not a crime, into the category of a crime. These are familiar and elementary principles; and in cases of that kind the corrupt motive, the bad faith, is essential to the crime itself, and without it there is no crime.”

In the case of *Pierce vs. Hanmore*, 86 N. Y., 103, in speaking of the obligations of an officer who was charged with signing a report “knowing it to be false” within the meaning of the statute, the Court said:

“To charge the officer with the severe penalty imposed, by signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made *in bad faith wilfully*, or for some *fraudulent purpose*, and not ignorantly or inadvertently.”

And the Court further remarked in this case:

“When the knowledge of the trustee is not directly proven, but is a matter of inference, the existence of a guilty motive or purpose may be material to establish the scienter. In determining whether the statute has been wilfully violated, something more must be shown than a want of strict compliance with its terms. . . . The statute is highly penal. It subjects the offender to all the debts of the company contracted while he is a stockholder or officer, without regard to the amount of his stock, and without any right of contribution, such as is provided for in the case of an entire omission to make a report; and we think it is intended to punish, not a mere act of negligence

or ignorance, but only an *intentional misrepresentation*. It contemplates that erroneous reports may be made, but punishes only the officers who sign them knowing them to be false."

In the case of *Stebbins vs. Edmonds*, 12 Gray, 203, which was an action for making a false certificate that the capital (\$130,000) had been paid in, it appeared that only \$40,000 had been paid in cash, and \$90,000 of stock had been issued in part payment for an exclusive license under a patent. The Supreme Court, upon the words of the statute, "knowing it to be false," observed that it was not enough to show that the certificate did not contain the exact truth, according to the strict legal interpretation of the statute, but it must be made to appear that it was *wilfully* false; that is, *made intentionally and with a purpose to deceive*, and that the *scienter* or guilty knowledge intended by the statute must be equivalent to *malā fides* in making the certificate.

Sec. 5208, Revised Statutes, providing that it shall be "unlawful" for any officer, etc., to certify, etc., and the Act of 1882 providing that it shall be a misdemeanor to "wilfully" violate that section, it is manifest that the certification to be criminal must be done both "unlawfully" and "wilfully" as these terms are interpreted by law; and hence the meaning of both words must be kept in view.

The word "unlawfully" is not equivalent to "wilfully." *State vs. Hussey*, 60 Me., 410; *Rex. vs. Davis*, 1 Leach, 556.

In *Reg. vs. Fife*, 17 Ont., 710, it was held that where an offense must be "unlawfully" committed, to charge that it was "wilfully" committed, omitting the term "unlawfully," was fatal.

In *State vs. Massey*, 97 N. C., 465, the Court said:

“ The term ‘ unlawfully ’ implies that an act is done or not done as the law allows or requires; but the term ‘ wantonly ’ implies turpitude—that the act is of wilful, wicked purpose. The term ‘ wilful ’ implies that the act is done *knowingly and of stubborn purpose*, but not of malice.”

What is by all these authorities treated as the *gravamen* of the crime—the purpose to do wrong, purpose to evade or disobey the mandates of law, bad intent, bad purpose, evil intent without justifiable excuse, evil design, corrupt motive, fraudulent intent, of stubborn purpose—however characterized, was ignored by the learned Circuit Judge in his definition of the offense in this case and in his entire charge and conduct of the trial. It seems to have had no place in his conception of the law of the case, and this fact crops out continually in his action and rulings throughout the whole trial.

The other rulings of the Court cited in this division of the argument are founded upon the same error.

The instructions that the jury might *infer* knowledge from defendant's *duty* to know; that the by-laws *required* him to know; the refusal to instruct that knowledge of the contents of the books could not be *imputed* to defendant because he was president or director; and the refusal to instruct that *want of knowledge* would excuse unless it proceeded from a *will to disobey the law* or from an *indifference to its commands*—all point to what we have suggested was a gross misconception of the law applicable to this case, and an attempt to apply to it the rule of mere *civil* responsibility.

Now we do not insist that it was not the duty of defendant to inform himself of the condition of the account; we concede that it was his duty to do so; but, in this connection, fairness to the defendant requires the fact to be kept in mind that the record shows he attempted to perform this duty and thought he had done so.

But what we do complain of is the *evidential effect* which the Court gave to that duty in the charge.

That effect was, to *place upon the defendant the burden of proof which the law casts upon the government* in reference to the essential *fact* of knowledge of the state of the account.

In other words, that the Court erroneously operated the defendant with the burden of *disproving* a fact essential to his conviction, *which had not been proven by the government*, and which in its nature could only be disproven by defendant's *own testimony*, and then, to intensify that error, vigorously challenged that testimony—in effect, *told the jury to disregard it*.

The Court will observe that the charge in question is not an application of the rule that the natural and probable consequences of an act, *knowingly and intelligently done*, will be presumed to have been *intended*. This rule and the presumption in such cases we concede. Without them, unlawful intent could scarcely ever be established. But that is not the question here, nor the meaning of this instruction.

On the contrary, the instruction is to the effect that the jury may infer or presume *the fact of knowledge*, which is the essential *prerequisite* of unlawful intent, from the mere *duty* of the defendant.

Now the defendant's *duty* was not, properly speaking, a *fact* at all, but a *relation* arising from certain rules of law or of the bank appertaining to the office of president and the defendant's occupancy of that office; and yet this instruction authorizes the jury to infer, from such *relation*, the *fact of defendant's knowledge* which it was incumbent upon the government to establish by proof; and the only escape of defendant was the poor privilege, which was afterwards substantially withdrawn from him by the

Court, of showing, if he could, that he did not, *in fact*, have such knowledge.

In other words, the effect was to authorize the jury to *infer the only disputed fact considered essential to guilt* from a mere *relation* of defendant, itself a mere *inference* of the Court from the law and the rules of the bank, and thereon to base a verdict of conviction, *unless* the defendant should overturn this fabric of *inference upon inference* by proving his ignorance *as a fact*.

We respectfully submit that such a method of establishing the guilt of a citizen of a grave crime is intolerable and utterly abhorrent to the moral sense.

Note carefully the language of the instruction:

"It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. *From the existence of such a duty you may draw an inference of fact that he did so inform himself*, if he did not already know it. But the *presumption of knowledge* is not an *absolute* one, and *the defendant may show*, if he can, that he did not, *in fact*, acquire information of the truth."

The Court had just told the jury, as has been seen, that all the essentials of the crime, according to his definition of it, were admitted—or, rather, not denied—except that of knowledge of the state of the account. Now he tells them that it was defendant's *duty to have this knowledge* before making the admitted certifications, and that *from that duty* they may *infer* that he *did have that knowledge*.

This is the plain meaning of the instruction; and if the suggested *inference* should be drawn, the case would stand made out, and that, too, without any proof at all on the *only* disputed fact in the case.

But, the Court further says, this *inference* or *presumption of knowledge* is not an *absolute* one, and the defendant may show, if he can, that he did not, *in fact*, have the knowledge.

Plainly and simply stated, the instruction comes to this: The knowledge of the defendant is the only fact denied which need be established in order to maintain the indictment, the others being admitted; you may *infer* this disputed fact from a *duty* of defendant, which I charge you exists, and, therefore, convict him, *unless he shows*, which he may do if he can, that, *in point of fact*, he did not have knowledge. In other words, he may overturn this *presumption of knowledge*, if he can.

If this is not shifting the burden of proof from the government to the defendant on the question of knowledge, it is difficult to perceive how such a thing could have been done.

Assuming that no proof was offered by defendant of his want of knowledge, can it be denied that under this instruction the jury might have convicted him upon the *admitted facts* of certification and want of funds, and upon the *presumption of knowledge* based on defendant's *duty*? This is a fair test of the question whether there was a shifting of the burden of proof by the instruction.

After this instruction is given, the Court adds, in the same paragraph:

“And, in general, if the defendant *acted in good faith* in making these certifications, believing that the state of the account of Dobbins & Dazey *justified it*, he is not guilty of the offense charged. Mere negligence or carelessness, unaccompanied by *bad faith*, would not *render him guilty*.”

And it has been contended by the government that this general statement cured the error, if there was any, in the preceding

lines as to the effect of defendant's duty; and the Court of Appeals seems to assent to that view, although it places its approval of the instruction, apparently, upon the idea that "defendant's legal duty, as an officer of the bank, to be informed, *was, prima facie*, evidence of his performance of that duty," citing 115 U. S., 339, 347, and 142 U. S., 71, both civil cases; and cites *Agnew vs. United States*, 165 U. S., 36, 49, as approving an instruction that "an inference or presumption of an unlawful intent throws the burden of proof on defendant."

The Court of Appeals seems to have fallen into the same error as the Circuit Judge in the application to the case of the rules and principles of civil responsibility instead of those applicable to crimes. This is evident from its treatment of this question and its citation of civil cases for the proposition that there is a *prima facie* presumption of the performance of *legal duty*—a proposition we have never questioned. It does not seem to have occurred to the Court that it was as much the legal duty of defendant *not to certify a check when funds were wanting* as it was *to know the funds were on hand* when he did certify; and the novel process of *presuming* the performance of one duty in order to convict a man of crime in the violation of another does not seem to have attracted its notice. This interesting question will have further attention later on in this argument.

As to the case of *Agnew vs. United States*, it does not sustain the conclusion of the learned Court of Appeals, for the reasons stated in the brief accompanying the petition to rehear.

*Vide passim* Rec., p. 127.

The contention of the government, above stated, is open to several answers. In the first place, the whole paragraph of the charge cannot be reasonably interpreted otherwise than according to the rule of construction which requires general statements to give way to special, definite, and particular ones which are in con-

flict. Reverse the order of these general and special statements, and the point we make will be clear. The charge would then stand substantially thus:

“Gentlemen of the jury: *In general*, if the defendant acted in good faith, believing the state of the account justified his certifications, he is not guilty of the offense charged; mere negligence or carelessness would not render him guilty.

“But, gentlemen, the bank was not liable upon these checks until the defendant made it so by certifying them. It was his duty before doing that to inform himself of the state of the account, if he did not already know it. From the existence of such duty you may infer that he did know it—it creates a presumption that he knew it, but this presumption is not an absolute one, and he may show, if he can, that he did not, in fact, acquire information of the truth.”

And when subsequently in the course of the charge, immediately upon construing the by-laws requiring of the president the honest and faithful discharge of his duties, the Court again told the jury, without one word of limitation or qualification, that “the honest and faithful discharge of his duties *required him to be informed of the condition of the account*,” it seems to us the jury could not have understood the *general* statement as modifying or taking away from their consideration the particular instruction as to his duty and its effect, made previously, and afterwards repeated with such emphasis, and without qualification, in immediate connection with the by-laws.

In the second place, the reference in the general statement to the defendant's acting *in good faith* must be taken in connection with the Court's definition of what he meant by acting in good faith; or, rather, acting *honestly and faithfully*, which is the

same thing. The Court told the jury, as has been seen, that "the faithful and honest discharge of his duties *required* him [the defendant] to be informed of the condition of the account."

And, again, when considering the expression, "believing that the state of the account . . . justified it," it must be taken in connection with what the Court elsewhere said of the belief which would justify the defendant in making the certifications. This will appear when we come to consider the 7th, 8th, and 9th assignments of error. What the Court required there was that defendant, in order to be justified in making the certifications, must have believed not only that the amount deposited was sufficient to cover the amount certified, but also *the overdraft then existing*, although the jury should find that he *had no knowledge of the overdraft*, and was not *chargeable with knowledge* by reason of shutting his eyes, etc.

And, lastly, on this point, the concluding lines, "Mere negligence or carelessness, unaccompanied by bad faith, would not *render him guilty*," do not help the criticised instruction, for the twofold reason that *bad faith*, as the Court defined it, substantially, was exhibited in certifying a check when there was a want of funds, although the defendant was ignorant of that fact, and because there was no such issue in the case. The defendant was not indicted for "mere negligence or carelessness," nor was any theory promulgated by the government to the effect that mere negligence or carelessness *would render him guilty*. On the contrary, the effort of the government was to show that, instead of being negligent or careless, the defendant knew the state of the account—that he was frequently among the books, which were subject to his inspection—that he frequently made inquiry of the clerks concerning accounts upon them—that everybody in the bank, from the cashier down, was familiar with the account, and in many other ways and by means of various circumstances and collateral matters the government sought to show that the de-

fendant was not negligent or careless, but actually *knew the state of the account*; while, on the other hand, the defendant sought to show that he did not know it, and it was urged in his behalf that want of knowledge, although such want of knowledge arose from carelessness, negligence, or overconfidence, *would excuse him*. The issue was, not whether mere negligence or carelessness *would render the defendant guilty*, but whether good faith and ignorance of the state of the account on the books, although such ignorance should be attributed to negligence or carelessness or overconfidence, constituted a good defense and *would excuse him*.

Now the Court told the jury simply that mere negligence or carelessness would not *render the defendant guilty*. It was not contended by the government that it would. The statement in this form met and was applicable to no issue in the case. The Court did not tell the jury that if defendant was merely negligent or careless without bad faith, that fact would rebut the presumption of knowledge arising from the duty to know. On the contrary, they were told that he might rebut this presumption by showing, if he could, "that he did not, *in fact*, acquire information of the truth"—leaving the impression not only that *that* was the only method open to him of rebutting that presumption, but also, we submit, implying that he must, nevertheless, make inquiry as to the state of the account, and if the information thus acquired was false, then he would be excused.

Now recurring to the main instruction under consideration, as to the presumption of knowledge from duty, it is to be observed, first, that even the presumption that public officers have done their duty does not supply proof of independent and substantive facts.

*United States vs. Ross*, 92 U. S., 281.

We have granted that it was the defendant's duty, growing out of his relationship to the bank as president, to inform himself

whether sufficient funds were in the bank before certifying the checks, and that this duty and relation were proper matters for consideration by the jury, in connection with all the other proof and circumstances bearing on the question of his actual knowledge at the time of certification.

But how can this duty supply proof of his knowledge of the state of the account? That knowledge is a *substantive fact*, alleged in the indictment, and necessary to be proven by the prosecution as one of the essential requisites of the crime.

Take a common-sense view of the matter for a moment. There is no *statute* that requires of an officer of a bank that before certifying a check he shall inform himself of the condition of the account of the drawer; but that duty does arise, manifestly, out of his office and relation to the bank. No statute, however, expressly so declares, or imposes upon him any penalty for the violation of such duty; and the case of *Potter vs. United States* clearly intimates that he may violate that duty with impunity, provided he acts without any purpose to do wrong. If he is ignorant of the want of funds, or acts without any purpose to do wrong, he is guiltless of crime, although he makes no effort to discharge this duty and inform himself of the state of the account.

On the other hand, the statute expressly imposes upon him the duty *not to wilfully certify a check* when there are not sufficient funds in the bank to meet it, and visits upon him heavy penalties of fine and imprisonment for its violation.

Now here are two duties, one arising from the relation of the officer to the bank, and, we will assume, also from the by-laws of the bank, with no penalties attached, and which may be violated with impunity so long as the officer acts honestly; the other expressly imposed by a statute of the United States, with heavy penalties attached. Assume, then, the undisputed facts of this case: An officer is found to have certified a check for a party

who had at the time no money to his credit, and there is no proof as to whether he knew of the want of funds or not. The charge is for *wilfully* violating the prohibition of the statute against certifying checks without funds. What *presumption* arises, either of law or fact? What *inference* may a jury lawfully draw under such circumstances? Is it to be *inferred* or *presumed* that the defendant performed his duty under the by-laws of the bank in order to predicate the conclusion that he *violated his duty under a statute of the United States and committed an infamous crime*, subjecting him to fine and imprisonment?

Such seems to be the logic of the instruction of the Circuit Judge and of the Court of Appeals in this case. That it is fallacious cannot but be obvious. It cannot be law that defendant is to be *presumed* to have observed the one duty in order to make him answerable criminally *for a violation of the other*.

It is a rule of law, and of common sense as well, that opposing presumptions, like opposing estoppels, neutralize and nullify each other and leave the matter at large (*Ricard vs. Williams*, 7 Wheat, 59); and "*omnia presumuntur rite acta*" is one of the maxims of the civil law, which obtains also in the common law; and one of the rules stated by Mr. Lawson and supported by many authorities is that "a person who is shown to have done any act is *presumed to have done it innocently and honestly*, and not *fraudulently, illegally, or wickedly*." (Lawson on Pres. Ev., p. 93.) Of course no one will question the presumption that a person charged with crime is innocent until his guilt is *proven beyond a reasonable doubt*, and that even *prima facie* proof of guilt does not remove such presumption.

Now, in view of the manifold beneficent presumptions indulged by the law, favorable to regularity, to honesty, to innocence, and in view of the provisions of the statute under which the defendant is indicted, the only presumption that can legiti-

mately be indulged in this case, from defendant's relation to the bank and his certification of these checks, is that the act was done *honestly* and *innocently*, in ignorance of the fact a knowledge of which would make his act not only *unlawful*, but *criminal*. This, we respectfully submit, is the proper and correct view of the doctrine of presumption in this case.

The real and only question to be determined by the jury, according to the view of the learned Trial Judge, was the *knowledge* of the defendant of the state of the Dobbins & Dazey account at the time of the certifications. We insisted that his unlawful or bad *intent* was also an essential element of the offense, implied by the use of the word "wilfully" in the statute; but the Court ignored that, as we have attempted to show, refusing in many ways both in the instructions given and denied, and in rulings on evidence, to recognize the pertinency of the question of intent.

So that, under the charge, the only *disputed* question necessary to be established to warrant conviction was the defendant's *knowledge* of the state of the account. The Court, as has been seen, after telling the jury that in order to warrant conviction three things must appear, namely, (1) certification by the defendant, (2) want of funds at the time, and (3) defendant's knowledge of such want of funds, proceeded to say (p. 34):

"Taking this evidence up in detail, *it is not denied* that the defendant certified these checks; and, secondly, that the account of the drawers was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks. *The knowledge of the defendant of the state of Dobbins & Dazey's account when he certified the checks is thus made the pivotal question in the case.*"

The whole case is here sharply stated in a nutshell by the Court as it was put by the Court to the jury. If the jury could reach the conclusion of defendant's *knowledge*, that was all that was necessary—all other essential facts being admitted.

The indictments alleged, as a fact, that defendant *knew* that Dobbins & Dazey did not have the funds in bank to meet the checks certified, and that, *with such knowledge*, he *wilfully* certified the checks.

These were manifestly material allegations—allegations essential to the validity of the indictments. That of knowledge the Court distinctly recognized as essential. It was, therefore, incumbent on the government to prove it as a fact *beyond a reasonable doubt*—not merely *prima facie*. In truth, the burden rested upon the government, in the first instance, to establish the whole case as charged—all the material facts—beyond a reasonable doubt, before the jury would be warranted in convicting.

Said Chief Justice Fuller, in *Agnew vs. United States*, 165 U. S., 49:

“Undoubtedly, in criminal cases the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial.”

And in *Lilienthal's Tobacco vs. United States*, 97 U. S., 266, the Court said:

“In criminal cases the true rule is that the burden of proof *never shifts*; that in all cases, before a conviction can be had, the jury must be satisfied, from the evidence, beyond a reasonable doubt, of the affirmative of the issue presented in the accusation, that the defendant is guilty in the manner and form as charged in the indictment.”

A headnote of *Stokes vs. The People*, 53 N. Y., 164, well supported by the opinion, is as follows:

“The Judge at the trial instructed the jury, in effect, that the law implied motive, and consequently the crime of murder in the first degree, from the proof of killing the deceased by the prisoner, and that upon this proof they should find him guilty of that crime, unless he had given evidence satisfying them that it was manslaughter, or excusable homicide.

“Held, error; nor was the error cured by a subsequent charge that if the evidence was doubtful, or if the jury entertain reasonable doubts, so that they do not know where the truth lies, the prisoner is entitled to the benefit of that doubt.”

In *State vs. Conway*, 55 Kan., 323, it was held that “an instruction which inferentially places the burden of proof upon the accused” is erroneous.

In *People vs. Millard*, 53 Mich., 70, the Court said:

“In every criminal case the burden of proof is throughout upon the prosecution. Whatever course the defendant deems it prudent to take in order to explain suspicious facts or remove doubts, yet it is incumbent on the prosecution to show, under all circumstances, as a part of their own case, unless admitted or shown by the defense, that there is no innocent theory possible which will, without violation of reason, accord with the facts.”

In *People vs. Fairchild*, 48 Mich., 32, 37, the Court said:

“The nature of the defense could not relieve the prosecution from the duty of proving the whole charge beyond a reasonable doubt; and it could make no difference

whether the doubt, in case of there being one, should arise from a defect of evidence on the part of the prosecution or from an impression made by evidence for the defendant."

In Wharton vs. State, 73 Ala., 368:

"In every criminal case there can be no doubt of the proposition that it is the duty of the State, in the first instance, to show beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis, every fact or circumstance which is necessary in order to establish the guilt of the defendant."

In the Trial of the Directors of the City of Glasgow Bank, already cited, it seems a similar effort was made to charge the defendants with some sort of *constructive* or *imputed* knowledge, arising from their duties as directors. The Court, in the charge, at page 435 of the report of the trial, delivered itself as follows:

"Secondly, as to the knowledge of the directors—as to their knowledge that these balance-sheets were fabricated. Now what the prosecutor has undertaken to prove, and says that he has proved, is not that these directors *were bound to know* the falsity of the statements in the balance-sheets—not that they *lay under obligations to know it*—not that they had the means of knowledge, but that, *in point of fact, they did know it; and that is what you must find* before you can convict the prisoners of any part of the offenses attributed to them. You must be able to affirm, *in point of fact*, not that they had a duty and neglected it—not that they had the means of information within their power and failed to use them—but that, *as a matter of fact*, when the balance-sheet was issued, *they knew that the statements contained in it were false*. I say that, because there has been some phraseology used

in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation; for what a man is bound to know he shall be held to have known. But *that has no place at all when a man is charged with crime*. His crime is his *guilty knowledge*, and nothing else. He is charged with *personal dishonesty*, and you must be able to affirm *that* on the evidence before you can convict him. But while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which *show and carry to your mind the conviction that the man* when he circulated, or when he made that balance-sheet, *knew that it was false*. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, *in point of fact, know the falsehood of which he is accused*."

Indeed, the principle announced by the instruction in this case goes further than is ordinarily permissible in a civil case.

In *Briggs vs. Spaulding*, 141 U. S., 132, Chief Justice Fuller, speaking for the Court, among other things, said, in reference to the conduct of the president and directors, sought to be charged in a civil suit with losses sustained by a national bank through the peculations and frauds of the cashier and employes having charge of its books and details:

"Their conduct is to be judged not by the event, but by the circumstances under which they acted (p. 155).

. . . Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption.

“ Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman vs. Dalley*, 51 N. Y., 27, 32, Judge Earl observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors: ‘ He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely entrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn, by their own efforts, the true condition of affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations,

and I know of no principle of law or rule of public policy which requires that it should.'

"And so Sir George Jessel, in *Hallmark's case*, 9 Ch. D., 329, 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and to have known that his name was on the register of shares as the owner of fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered on the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex Parte Brown*, 19 Beav., 97, which shows that it is the duty of a director to look at the entries in any of the books; and it would be extending the doctrine of constructive notice far beyond that of any other case to impute to this director the knowledge which it is sought to impute to him in this case' " (162-3).

In *Verona Cheese Factory vs. Murtaugh*, 4 Lans. (N. Y.), 17-22, which was an action to recover penalties imposed by statute upon "whoever shall knowingly" do certain acts, it was held that knowledge could not be imputed to the defendant from the acts of others and their agency for, or relation to, him. The Court said:

"The term 'knowingly' in an action like this must undoubtedly be held to mean *actual personal knowledge*. . . . The term 'knowingly' was used to designate the person upon whom the penalty was imposed; and it is not to be enlarged or extended so as to reach any supposed

mischief which the statute was intended to guard against and prevent.”

In *Murray vs. The Nelson Lumber Company*, Supreme Court of Massachusetts, 9 N. E. Rep., 634, where it became necessary to prove that the directors of a corporation had knowledge of a certain fact, the Judge who tried the case ruled that, in the absence of direct and positive evidence of the knowledge of the directors, jurors had the right to assume that they were doing what they were appointed to do, and that they know what they are appointed to know. But the Supreme Court held that this ruling was erroneous. In other words, that it must be proved as a fact that the defendant had knowledge, he cannot be charged with imputed knowledge, and he cannot be held guilty simply because the jury find that he had the opportunity to know.

We add, in conclusion of this division of the argument, as we wish the Court to clearly understand our position, that we concede that defendant's duty was a circumstance proper for the jury, *along with all the other facts and circumstances of the case* on the question of his knowledge. We also concede that the fact of knowledge, as well as of intent, may be proven by circumstances, like any other fact. But we contend that the burden rests on the government *to establish by proof*, beyond a reasonable doubt, the fact of guilty knowledge, just as any other essential and disputed fact of the case; and that the question is, whether *upon all the proof in the case on both sides, and as a whole*—including the fact or proof of defendant's duty—that knowledge is so established. And we insist it was error for the Court to single out a fact or circumstance, as the *duty* of defendant, segregate it from the other facts and circumstances, and tell the jury that they might *infer* or *presume* from that the fact of knowledge, and thereby *shift the burden of proof*, which rests upon the government, to the shoulders of the defendant.

VIII.

MODIFICATION OF SPECIAL INSTRUCTIONS SO AS  
TO MAKE DEFENDANT RESPONSIBLE FOR  
OVERDRAFT, WHETHER HE KNEW  
OF IT OR NOT.

This is the 7th subject stated generally at the beginning of this argument, and is briefly referred to at pp. 7-10 of the petition for certiorari, which see for the full 5th and 7th special instructions as they were asked, for the 5th instruction as modified and given, and for the instruction given as a part of the 7th. The same matter appears at pp. 50-52 of the record. See also brief with petition to rehear.

Rec., pp. 138-140.

This action of the Court is the basis of the 7th, 8th, and 9th assignments of error.

Rec., pp. 16-17.

The error here manifested is that of which we have already so much complained, in its most intensified form, namely, the error of attempting to reach a conviction by *inferring*, or *presuming*, or *imputing* to the defendant a knowledge of the state of the Dobbins & Dazey account which neither the *facts* directly proven nor the *circumstances of the case* fixed upon him—an error which is fundamental and pervades the case in its every part; but it is more than this—the action of the Court upon these instructions was *contradictory* and *inconsistent with itself*, and *confusing to the last degree*; and, moreover, if followed by the jury, excluded all possibility of acquittal.

It is to be observed, in the first place, with reference to both

these requested instructions, that there was evidence before the jury tending to establish *every fact* hypothetically put by them—evidence from which, as the bill of exceptions states, *every one of such facts might have been found by the jury*. We make the statement with emphasis that there is not a single fact asked to be put hypothetically to the jury in either of these instructions as originally offered, which the jury might not have *found to be true* from evidence before them—evidence which the bill of exceptions shows came as well from the *plaintiff's* as from the defendant's witnesses, and which would have *warranted* such findings.

Now if these were really the circumstances and this the situation as defendant understood them, it is most obvious that when a check of Dobbins & Dazey was presented to him for certification, in the absence of the cashier, the *most natural* source of inquiry open to him would be, not the individual bookkeepers, for their books would not likely show the deposits of that day, but the exchange clerk who kept an account of the New York drafts as they came in; and if, *having no knowledge of an overdraft*, he received information of deposits on that day sufficient to cover the check, it would be entirely reasonable for him to certify it. The exchange clerk proved that such inquiries were made of him by the defendant; and, moreover, it was shown that on each day of the certifications, with one exception, when Porterfield was in and told defendant the account was all right, *deposits were in fact made more than sufficient to cover the checks certified*.

In view of this aspect of the case, which was indeed the most vital of all aspects of the case to the defendant, and in order that the jury might pass upon it fairly, defendant asked the Court by these requests to instruct them, in substance, that if they found from the proof that, notwithstanding the account was overdrawn on the books, defendant *did not know it*, and believed in good faith when he certified the checks that the exchange deposited

by Dobbins & Dazey on the days of the certifications was sufficient to cover the amount of the check certified, he was not guilty.

Is it possible defendant was not entitled to this instruction, especially with the addition of the qualification, not excepted to, "unless such ignorance of the overdraft was *wilful* as elsewhere explained in the Court's instructions"? If the facts hypothetically assumed were true, was he not innocent of a *wilful* false certification, as that offense is defined by the authorities we have quoted? Where was the *criminal knowledge*, the *bad intent*, the *purposed* and *conscious violation of law*?

But what did the Court do?

It said, in effect, that although defendant *had no knowledge of the overdraft* at the time he certified the checks, yet he must have believed, in order to be innocent, that the exchange deposited was sufficient to cover, not only the checks certified, *but also the overdraft then existing*. In other words, he must have believed the deposits sufficient to cover not only the checks he certified, but also *another indebtedness of which he had no knowledge*. This is the necessary meaning of the instruction as modified by the Court, if it can have any meaning at all. It is even worse than if it said, in so many words, defendant *was bound to know of the overdraft*, and was guilty *whether he knew of it or not*, for then it would at least have had the merit of consistency with itself.

It would have been fairer to defendant to have refused the instruction entirely than to have modified it and *reversed* its meaning in this way. A shield of defense in its original form, it was converted by the Court into a sword of inevitable destruction, for it suspended the hope of acquittal upon a most obvious impossibility.

This same error is repeated again in the clause of the charge above quoted, taken in part from the final clause of the defendant's 7th special instruction.

The Court wrote upon the margin of the original 7th special instruction that the latter part of it was correct and would be given. But alas, when it came out, how metamorphosed it was, how different, how *opposite* from what was in the mind of defendant's counsel! Let us place side by side, for comparison, the latter part of the 7th special instruction as it was asked, and the instruction which was given:

ASKED.

"And that, having no knowledge of the overdraft of Dobbins & Dazey's account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him."

GIVEN.

"If you find that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, *in addition to the existing overdraft*, he would not be guilty under the indictment, and you should acquit him."

Now note the omission of the antecedent qualifying terms of the instruction asked, and the addition of the same fatal words which were inserted in the 5th special instruction—"in addition

to the existing overdraft"—and are we not forcibly reminded of the words of the Saviour when he said:

"Or what man is there among you, whom if his son ask bread will he give him a stone? Or if he ask a fish, will he give him a serpent?"

The whole of the 7th special instruction, we respectfully insist, should have been given without modification. The facts it puts were pertinent to the case and went to the very heart of it, in elucidating the defendant's situation and the *intent* with which he acted. They enabled the jury to judge the defendant, as Chief Justice Fuller so well said in the case of Briggs vs. Spaulding, "not by the event, but by the circumstances under which he acted." And when the Court carved out a part of it, emasculated that of its meaning by separating it from its context, and then added a clause which completely *reversed* its import and made of it an absolutely *fatal* instruction against the defendant—rendering his acquittal utterly impossible, for there was no pretense that he believed the deposits sufficient to "cover the check certified, *in addition to the existing overdraft,*" and indeed this was not possible if he did not know of the overdraft—the error in refusing the instruction was doubly intensified.

It was urged by the learned counsel for the government in opposition to our motion for new trial, doubtless with effect upon the Court—and it may be so contended here—that the 5th instruction was not good because *the law applied the deposits first to the overdrafts*, as the Court had instructed the jury in the charge. (Rec., p. 149.) The language of the brief was (pp. 8-9):

"The instruction, as originally presented, was well calculated to mislead the jury into supposing that if 'the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified, was sufficient to cover

the amount of said checks, then the defendant was not guilty,' etc.; whereas, the exchange deposited by Dobbins & Dazey, *as a matter of law, had to be appropriated to the absorption of the overdraft which appeared on the account at the commencement of business.*"

If anything were wanting to show the utter perversion of the humane doctrines of the criminal law in the minds of this prosecution, it is to be found in the sentence just quoted.

In heaven's name, what has the *legal appropriation of the deposits to the overdraft* to do with the question of defendant's guilt *if he was ignorant of the overdraft, and his ignorance was honest and not wilful?*

Now here is a man who, according to this instruction, *as given*, has *no knowledge of any overdraft*, either *actual or constructive*, who *honestly* certifies a check that is fully covered by a deposit which, as he is informed, is made on the same day, and which is *in fact* made—and yet it is gravely argued that he is to be held guilty of the infamous crime of *wilfully* certifying *that check, knowing there were no funds to meet it*, because forsooth *the law* immediately applied the deposit to the *absorption of an overdraft of which he had no knowledge*.

Such a proposition is worthy only of the heartless inhumanity of the Draconians, whose laws are said to have been *written in blood*.

Another argument which was made by counsel for the government in support of the Court's action in thus modifying the 5th instruction, on the motion for new trial—and which may be repeated here—deserves notice.

We refer to the analysis which they attempted of this 5th instruction, on page 9 of their printed brief.

“ Let us take the first clause of the instruction,” said counsel,  
“ which was as follows:

“ ‘ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft, . . . then he is not guilty, and you should acquit him.’

“ Such an instruction,” said they, “ would have been correct.”

“ Now let us take the second clause of the instruction,” said they, “ which was as follows:

“ ‘ If the defendant certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey, on the days upon which said checks were certified, was sufficient to cover *the amount of said checks*, then he is not guilty, and you should acquit him.’

“ Such an instruction,” it was gravely suggested, “ would have been manifestly improper, *because, as a matter of law*, the exchange deposited *would have to go in absorption of the overdraft* existing at the commencement of business.”

Now it may be that the latter clause, *standing alone*, would have been improper; for it is to be observed that counsel have cut it off both from the antecedent clause *negating knowledge of the overdraft*, and from the succeeding clause, “ unless such ignorance [of the overdraft] was wilful as elsewhere explained in the Court’s instructions ”—which latter clause was added by the Court, but without exception by defendant. So that the second clause in counsel’s analysis stands *without any negation of knowledge of the overdraft*; and if we assume such knowledge,

then said clause, standing alone, would manifestly have been improper.

But is this a proper or a lawyer-like or judge-like way to treat the instruction requested by defendant? Is this a proper way to test its meaning? In the same way we may prove by the language of the Bible that there is no God. The very words are there: "There is no God." But the meaning is quite different when we read the whole sentence: "The fool hath said in his heart, There is no God."

Now this remarkable analysis and the even more remarkable deduction from it, amount simply to this: The first clause which, standing alone, would have been proper, is rendered noxious by the further fact, stated in the second clause, that *deposits were made, or believed by the defendant to have been made, sufficient to cover the checks certified*. And this *because the law seized those deposits and applied them elsewhere, though without the defendant's knowledge*.

To state it a little differently: If the defendant, being ignorant of the overdraft, had certified the checks *without any semblance of a basis for his act*, he would have been innocent; but if he had information of deposits sufficient to cover them, and therefore *a reasonable basis for his act*, he is guilty!

Such is the logic which opposes us on this question.

We specially refer to the brief on petition to rehear and authorities therein cited, on these assignments.

Rec., pp. 138-141.

If the 5th instruction means anything, it means that the Circuit Judge himself thereby *made* the inference of defendant's knowledge of the state of the account which he had previously told the jury they *might* make, for in it he holds the defendant to the necessity of seeing that the deposit of which he had information

and on which he relied was sufficient to cover the overdraft then existing, although the jury should believe he did not know of such overdraft and could not be charged with knowledge by shutting his eyes, etc.

## IX.

### ACTION OF COURT ON REQUEST OF JURY FOR “THE LAW AS TO THE CERTIFICATION OF CHECKS WHERE NO MONEY APPEARED TO THE CREDIT OF THE DRAWER.”

This is the 8th and last question stated generally at the beginning of this argument. It is briefly adverted to in the petition for certiorari (pp. 5-7).

The learned counsel for the government, in his opening statement to the jury, had conceded that the word “wilfully” imported a “bad intent, to injure the bank,” and offered evidence of sundry collateral facts as proof of such intent. The record shows that as many as three times, in his opening statement to the jury, counsel for the government used this expression: “As further evidence that Spurr certified the checks of Dobbins & Dazey *wilfully, or with bad intent, to injure said bank*, the government expects to prove,” etc. (see Rec., pp. 54, 65, 66, and 67, paragraphs 13, 14, and 15, of opening statement); and by far the larger part of the time and labor of the trial, as is apparent from the record, was consumed in efforts of the government to show, by collateral matters not connected in any way with Dobbins & Dazey or the offenses charged, that defendant acted “*wilfully, or with bad intent, to injure the bank.*”

This intent of the defendant was naturally the subject of discussion by counsel before the jury. It was expected, of course,

that the Court in the general charge would refer to the statute creating the offense and explain and define its terms, and especially the term "wilfully;" and hence the requests by defendant for special instructions, which were formulated and handed to the Court at his suggestion before the delivery of the general charge, contained only one instruction embodying the word "wilfully" as applied to the act of certification, which, as has been seen, was refused.

Notwithstanding the statute made criminal only a *wilfully* false certification, the indictment charged a *wilfully* false certification, and counsel had read the statute and discussed before the jury a *wilfully* false certification, yet the Court had gone through his entire instructions to the jury and committed the case to them *without even so much as referring to the statute creating the offense*, or to the argument on the subject, and without defining to the jury what a *wilfully* false certification was, or even *using the word "wilfully"* as applied to the act of certification anywhere in his charge.

It was no matter of surprise, therefore, that the jury, under these circumstances, should soon find themselves at sea on the very threshold of the case—that they should wish to be informed of the offense they were trying defendant for. It is fairly inferable that, after reading over the charge for themselves, they were puzzled at finding nothing in it about the word "*wilfully*," and the "bad intent to injure the bank," of which so much had been said and to establish which so much evidence had been offered on the trial; and hence, after deliberating some hours, they return and hand to the Court a paper reading: "We want *the law as to the certification of checks where no money appeared to the credit of the drawer.*"

If confirmatory proof were needed of the justice of our criticisms of the several previous actions of the Court in this argu-

ment, it is to be found in the reply of the Court to this most natural, reasonable, and pertinent request of the jury.

The following is the Court's answer and action thereon, as quoted from the record (pp. 53-4):

“ ‘The jury state that they want the law as to the certification of a check where there is no money to the credit of the drawer.

“ ‘I cannot better answer this question which the jury has put to the Court than by reading the section of the Revised Statutes which relates to that subject [reads from Sec. 5208, R. S.]: “It shall be unlawful for any officer, clerk, or agent of any national banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.”

“ ‘Does this answer your question?’

“ Foreman of the jury: ‘Yes, sir.’

“ The Court: ‘I read it again, so that you may all understand it.’ (The Court read again that part of Sec. 5208, R. S., quoted above, and added):

“ ‘Is that all, gentlemen? The \$30,000 was the credit allowed, and these overdrafts, as the Court understands from the testimony in the case, were in excess of that. The account of Dobbins & Dazey—the overdrafts—were in excess of the amount which Dobbins & Dazey had as a limit or line of credit.

“ ‘I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation against the

bank, and it does not create any obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the bona fide holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. *That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*

“ ‘ You understand what I have said now is to be taken in connection with what I have before instructed you.’ ”

“As the jury were retiring, counsel for defendant said to the Court that he thought what the jury wanted was the Act of 1882 making it a misdemeanor to wilfully violate the section of the Revised Statutes which the Court had read to them, and that the Court ought to read and explain that Act to the jury. The Court asked if counsel referred to the Act prescribing the penalty for false certification, and, on being answered in the affirmative, stated that *the jury had nothing to do with that.*

“ To this action of the Court in reading twice Sec. 5208 of the Revised Statutes and in failing to read and explain the Act of 1882, in response to the jury's question, and to the additional instructions given to the jury at this time, beginning with the words ‘ the \$30,000 ’ and ending with the words ‘ to meet it,’ the defendant then and there excepted.”

And this action is the basis of the 11th assignment of error.

Rec., p. 18.

Now there cannot be a doubt, we respectfully submit, that what the jury wanted to know was the *law applicable to this case*

which they were trying—the law applicable to a *criminal* false certification. Most assuredly they could have had no use for any other. They were not concerned with what it was merely *unlawful* for national bank officers to do, but with what it was *criminal* for them to do. Besides, the Court had told them in the first part of the charge (Rec., p. 148): “It is upon the *false certification* of the four above-mentioned checks that the issues of this case are joined.”

What reply should the Court have given to this request of the jury, especially in view of the omissions in previous instructions which made necessary such request? Manifestly the Court should have read and expounded the law which created the offense—at least, what was necessary to constitute a *wilful violation* of Sec. 5208, Revised Statutes, inhibited by the Act of July 12, 1882, should have been stated and explained. Yet the Court, instead of doing this, reads to the jury as a full answer to their request—nay, more, as the *best* answer he can possibly give them—a statute which created no offense against the criminal law, a statute which simply declared what should be *unlawful* in respect to certifying checks, like the taking of excessive interest, or real estate security, or the loaning of more than one-tenth of the capital stock to one person, firm, or corporation, by a national bank, would be unlawful.

But this is not the worst, though bad enough. The Court does not stop with the simple reading of this civil statute as an answer to the jury's request, although assured by the foreman that their question has been answered (?). The Court proceeds to reiterate and emphasize what had been told the jury in the general charge: “That a check drawn upon a bank, where the drawer has no funds, creates no obligation against the bank,” that “it does not create any obligation until it is certified as good by an officer of the bank,” that that certification “makes the check good as to the holder of it, and the bank then becomes estopped, although

there was no warrant for the drawing of the check, as against the bona fide holder," that "the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good;" and then tells the jury that "*that is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*"

Can there remain a vestige of doubt that the jury understood this as *the law of the case they were trying*—a definition of such a *false certification* as the Court had told them the issues of the case were joined upon?

And yet no hint is here given them that to be criminal the act must be done *wilfully*. Nothing is here said of the *intent* of the defendant. His conscious *knowledge* of the circumstances of his act is not even referred to as an element of the offense. They are told, in substance, and almost in so many words, expressly, that *the certification of a check by an officer of a bank when there are no funds there to meet it, is the offense for which they are trying the defendant.*

It is, we submit, no sufficient answer to say that the Court, at the conclusion of this "definition" of the offense, told the jury that what he then said was to be taken in connection with what he had before instructed them. The Court had not previously, as has been seen, given any clear and explicit definition of the offense; and for this reason, manifestly, the jury asked for such definition. This was the place to give it. This was the Court's last utterance to the jury, and it is idle to say that this pointed, explicit, and vigorous answer of the Court to a request calling specifically for a definition of the offense, obviously intended by the Court to be full and complete, can be modified and cured by a general reference to previous instructions in themselves so uncertain as to leave the jury in doubt as to their meaning and induce them to call for further and more specific instructions.

The obvious effect of this instruction upon the jury was to make certain, in their minds, what was before uncertain and indeterminate by them from previous instructions, namely, that the *offense*, of which they were to determine the defendant's guilt or innocence, was "*the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*" This is the language of the Court in the very last sentence of the instruction.

Moreover, that it was the purpose of the Court to leave this with the jury as a complete definition of the offense, disentangled from any qualifying conditions implied by the word "wilfully," as employed in the Act of 1882 and in the indictment, is most manifest from the refusal of the Court to read and explain that Act to the jury, when requested to do so by defendant's counsel, and from his statement at the time that "*the jury had nothing to do with that Act.*"

Astonishing as it may appear, the contention of counsel for the government in support of this action of the Court has been that it was *satisfactory to the jury, because the foreman said so*; and more astonishing still is the fact that the learned Court of Appeals sustains counsel in that view. That learned Court, in its opinion on this point, says:

"The argument in support of this exception *assumes* that 'what the jury wanted to know was the law applicable to this case, . . . the law applicable to the criminal false certification;' and, therefore, the Court should have read Sec. 13 of the Act of July 12, 1882. . . . *The assumption is negatived by the answer of the jury.*"

Rec., p. 117.

That our contention is not an assumption, but is based upon fact, and the only reasonable conclusion arising from the circumstances, we submit, is indisputable. It is inconceivable why the

jury should have wanted any other law than that which was *applicable to this case*—to such a certification as they *were trying the defendant for*. They had no concern with, and could have had no use for, the law applicable to a mere *civil* responsibility. As has been seen, this has been the trouble throughout the case—it has been treated too much as if it depended on the section of the Revised Statutes read by the Court alone; the Act of 1882 has been well-nigh lost sight of, relegated to a position of “innocuous desuetude.”

As to the reply of the foreman of the jury that the reading of Sec. 5208 of the Revised Statutes answered their question *negating* our contention, that implies that *the jury*, having asked the Court for information *on a matter of law*, are to be the judges of the correctness of that information; and if *they are satisfied*, that ends all controversy. It ought to be sufficient to remind the Court that the jury were not the arbiters of the law, nor the censors of the Judge as to matters of law. They had asked him for instruction in a pure matter of law, about which it must be assumed they were ignorant, else they would not have asked the question nor needed to be instructed at all, and it was the duty of the Judge to instruct them correctly. Whether he *satisfied the jury* or not is wholly immaterial; the question is: Did his instruction *satisfy the law*?

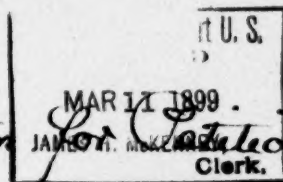
Respectfully submitted,

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N<sup>o</sup>. 448.

Brief of Horton for Petitioner  
Filed Mar. 11, 1899.



IN THE  
**Supreme Court of the United States.**

MARCUS A. SPURR, *Petitioner,*  
vs.  
UNITED STATES, *Respondent.* } No. 448.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH DISTRICT.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR  
MARCUS A. SPURR.

ALBERT H. HORTON,  
*One of the Counsel for Marcus A. Spurr.*



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SUPPLEMENTAL BRIEF AND ARGUMENT FOR  
MARCUS A. SPURR.

I.

TRANSACTIONS OF STOCKS IN 1886-7 REFERRED TO. ERRONEOUS INSTRUCTION THAT TECHNICAL VIOLATIONS OF THE BY-LAWS OF A BANK, OR OF THE STATUTES RELATING TO NATIONAL BANKS, BY A CASHIER, AFFECT THE RIGHT OF THE PRESIDENT OF SUCH BANK TO RELY ON THE STATEMENTS OF SUCH CASHIER. UNDER THE RULINGS OF THE TRIAL COURT, A PRESIDENT OF A NATIONAL BANK IS NOT PERMITTED TO RELY ON THE STATEMENTS OF A CASHIER ABOUT THE ACCOUNTS OF THE BANK, EVEN IF HE IS REPUTED TO BE AND BELIEVED BY THE PRESIDENT TO BE A MAN OF HONESTY AND TRUTH.

AS STATED in our former brief, Marcus A. Spurr was indicted for the false certification of certain

checks under § 13 of the act of Congress of July 12, 1882. This section reads :

“That any officer, clerk or agent of any national banking association who shall willfully violate the provisions of an act entitled ‘An Act in reference to certifying checks by national banks,’ approved March 3, 1869, being section 5208 of the Revised Statutes of the United States, or who shall resort to any device or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof in any circuit or district court of the United States, be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, in the discretion of the court.” (Act of July 12, 1882. Supplemental to the Revised Statutes of the United States, Volume 1, second edition, 1874-1891, page 357.)

See, also, § 5208, Revised Statutes of United States.

The case was first tried before Judge SAGE, and resulted in a mistrial. Then it was tried before Judge W. H. TAFT, and resulted in an acquittal for Mr. Spurr on all the counts based on the check of February 27, 1893, and a mistrial as to the other counts. It was again tried, before

Judge HENRY F. SEVERENS, and on Friday, April 17, 1896, the following verdict was returned :

*"Came the United States Attorney, and came the defendant in proper person, and came also the jury heretofore impaneled, and upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the court."*  
(R. 5.)

On December 12, 1896, the motions of Mr. Spurr for an arrest of judgment and for a new trial were overruled, and thereupon the following proceedings were had :

*"The court, being cognizant of the facts attending said verdict and of the manner in which the issues found by said verdict were submitted to the jury, finds and so orders and adjudges that said verdict is applicable to indictment No. 7994, counts 1 and 4, and indictment No. 8139, count 3, all of which are based upon a check certified by the defendant, dated January 3, 1893; and upon said verdict upon said counts of said indictments, the court orders and adjudges that the defendant be confined in the penitentiary of the State of New York, at Albany, New York, for two years and six months from this date."* (R. 7, 8.)

Subsequently an appeal was taken in the case to the United States Circuit Court of Appeals for

the Sixth Circuit, and an opinion was handed down by that court on June 1, 1898, affirming the judgment. (R. 105-123.) The case is now here on a writ of certiorari. In view of the brief and argument recently filed for the United States in this cause, we supplement our former brief with a short additional argument.

We discussed very fully in our principal brief the alleged error of the trial court in admitting upon the trial evidence of separate, independent, and dissimilar collateral matters of 1886-7, and the rulings of the court upon the effect thereof. (Brief, pp. 21-52.) After counsel for defendant below had objected to the evidence and the court had heard argument thereon, the trial judge said, *inter alia* :

"I greatly doubt whether it [such evidence] would be admissible on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of the respondent's right to rely on the representations made by Mr. Porterfield [cashier of the Commercial National Bank], or upon his assumed correctness of action and honesty of purpose. . . . I think it bears in a sense upon the question of the right of Spurr to rely upon Porterfield's representation upon the question of fact whether he did rely upon any assumed correctness or honesty of action."

At the time the court announced its rulings, the jury were present. (R. 55-56.)

Subsequently, upon cross-examination, the question of the scope and purpose of this evidence was further discussed in the presence of the jury, and the court said, *inter alia* :

“The view of the court as to the particular transactions or matters that have just been referred to is this: The question here involved cannot be affected by what was done by the bank with other customers. Those transactions must stand or fall upon their own merits, and this particular transaction cannot be affected by what the bank may have done with other parties.

“Mr. Pitts: I don't know as I made myself clear, if your Honor please, as to the purpose of the evidence. It was simply to show the character of the transactions, and that they were of the same character as those proven by the Government, and belong in the same category, so as to show it was in the ordinary course of business of the bank. That was all.

“The Court: If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done. I do not mean to characterize or express any opinion about any particular transaction, but it seems to me the whole inquiry in reference to this very question is upon a collateral substance; and to refer again to what I have already said, if those

transactions were of an illegal character, it would not help the present situation." (R. 60-61.)

We call attention specially to the language of the court, made in the presence of the jury, concerning stock purchases made in 1886-7: "If they were in the ordinary course of business of the bank and were illegal and in violation of its by-laws, or the statutes, it would not help matters if that practice was done." (R. 60.) There was no proof of any loss by the bank on account of these transactions of 1886-7, nor of any dishonesty of Porterfield in respect to them, further than what might be implied from the fact that such transactions were not authorized by the national banking law. (R. 61.)

Referring to the stock purchases of 1886-7, the court in its general charge instructed the jury that—

"The using by its officers of the funds and credits of a national bank in speculation on stock and cotton exchanges, carried on either in the interest of the bank or its officers as individuals, or any other persons, is unlawful; their franchises do not contemplate such operations, and it is an abuse of the lawful powers of the bank, and such use is a misappropriation of the property of the bank. The fact, if it be such, that other national

banks, however numerous they were, were engaged in such business, did not render it legal, nor can the opinion of other persons that it was proper, rightfully affect the view which the court and jury must take of the legality of such practices. If the jury find from the evidence that Mr. Porterfield was engaged, with the knowledge of Spurr, in thus misusing the credits and funds of the bank on cotton and stock exchanges in speculation in his own or other persons' interest, the jury are at liberty to find in that a reason why Mr. Spurr should not have confidence in Mr. Porterfield's integrity and fidelity to the interests of the bank, and why Mr. Spurr would, in the exercise of his own duties, have exercised a closer scrutiny of the dealings of Dobbins & Dazey with the bank, especially if he had reason to suppose that firm was engaged in such speculations." (R. 63, 154, 155.)

The court also charged the jury that the defendant would be deprived of the right to rely upon the cashier, if it was shown beyond a reasonable doubt that Mr. Spurr knew that the cashier was acting "unlawfully in respect to its affairs." (R. 153.)

"Defendant requested the court to give the following special instruction, being the 13th of defendant's requests:

"13. Although a national bank has no authority by law to receive and execute orders from its

customers for the purchase and sale of stocks and bonds upon margin, yet if you find from the proof that it was customary for the national banks of this city to do such business, and that the Commercial National Bank did such business for its customers with the knowledge and approval of its board of directors, charging commissions and interest and requiring its customers to fully protect the bank by the deposit of ample funds or securities for that purpose, and that such business was a fruitful source of revenue or profit to the bank, and such profits were received and disbursed among the stockholders, and the defendant had no knowledge or reason to suspect the unfaithfulness or dishonesty of the cashier in his conduct of such transactions, then the defendant cannot and ought not to be prejudiced in this case by the fact that the bank did such business, nor by the fact that he himself gave to the cashier orders for the purchase and sale of stocks on his own account, if he secured the bank amply with his own securities as other customers were required to do.

“Which instruction the court refused, and to which refusal the defendant then and there excepted.” (R. 63, 64.)

It is evident from the ruling of the trial court, that the court was in doubt for what purpose evidence of the stock transactions of 1886-7 was admissible.

Referring to the stock purchases, the court also, in its general charge to the jury, said :

“The defendant is not on trial directly for his complicity with such previous speculations and misuse of the bank’s property in them ; and proof of them has been admitted, *and is to be applied by the jury, solely upon the question of the knowledge and intent of the respondent when he made the false certification of the checks mentioned in the indictment.*” (R. 155.)

It appears from the record, that when the evidence of the stock purchases of 1886-7 was admitted, the court said :

“I greatly doubt whether it would be admissible [ for the purpose of effecting the question of intent ] on the ground of remoteness of time, but I am inclined to think it admissible as affecting the question of respondent’s right to rely on the representations made by Mr. Porterfield.” (R. 56.)

But when the court charged the jury, it held such evidence admissible, *not only as affecting the defendant’s right to rely on the representations made by the cashier, but also that such evidence “is to be applied solely upon the question of the knowledge and intent of the respondent, when he made the false certification of the checks mentioned in the indictment.”* Therefore, the court impressed the jury

that the transactions referred to in 1886-7, about stocks, *were important in determining the knowledge and the intent of the defendant in certifying the checks referred to in 1892-3.*

Defendant also requested the court to give the following special instruction, being the defendant's 10th request :

*"10. If you find from the proof that the defendant relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey, and that he did so in good faith, believing those statements and representations to be true, his certifications made in honest reliance upon them would not be criminal; and if the cashier was reputed to be, and believed by the defendant to be, a man of honesty and truth, the defendant would have the right to rely upon his statements in regard to that account."* (R. 64, 153.)

The court struck out "truth," and substituted "right conduct as respects the affairs of the bank," and then gave the instruction modified. (R. 64.)

It therefore appears from the record that the evidence of the collateral transactions of 1886-7 was pressed before the jury by the language of the court in various forms as of supreme importance for their consideration. The jury must

have understood from the remarks of the court concerning this evidence and the instructions given thereon, taken in connection with the instruction which was prayed for, but refused, that if the cashier in the ordinary course of business of the bank committed technical violations of the national banking law, Mr. Spurr had no right, as president of the bank, to rely on the representations made by the cashier, or upon his assumed correctness of action or honesty of purpose. If the court had said in its remarks to the jury and in the instruction referred to that if the cashier had violated, in the alleged transactions of 1886-7, the national banking law with a bad purpose,—with an evil intent,—with a purpose to do wrong, a very different question would be presented. Upon the trial, defendant below testified that he “relied upon the statements and representations of the cashier as to the condition of the account of Dobbins & Dazey,” (R. 64,) and that the cashier’s “reply always was that it was perfectly satisfactory and very profitable.” (R. 82.)

On account of the remarks of the trial court and the instructions given, and the refusal to give the one referred to, this evidence of the defend-

ant necessarily could have no weight with the jury. If the jury found that in carrying on the transactions of 1886-7, concerning which "there was no proof of any loss by the bank on account thereof," (R. 61,) the cashier, in following the ordinary course of business of the bank, acted unlawfully and in violation of its by-laws or of the statute, (regardless of whether such action was willful or not,) the jury were to understand that Mr. Spurr had no right to rely upon the statements of the cashier regarding the account of Dobbins & Dazey. This is emphasized by the action of the court in striking out from the tenth instruction prayed the word "truth," and inserting in place thereof, "right conduct as respects the affairs of the bank." (R. 64.) In view of the remarks of the trial court referred to, and the instructions to the jury contained in the general charge of the court and the modification of the tenth request prayed for, the jury were informed in substance that the defendant had no right to rely upon the statements and representations of the cashier of his bank on account of mere unlawful or technical violations of by-laws or the statutes; and yet the record shows that

there was no proof of any loss by the bank on account of the transactions of 1886-7, nor of any dishonesty of Porterfield at that time in respect to them, further than what might be implied from the fact that they were not authorized by the national banking act.

The court refused, as above stated, to instruct the jury that if the defendant in good faith believed the statements and representations of the cashier to be true, and "if the cashier was reputed to be and believed by the defendant to be a man of honesty and truth," he might rely upon such statements and representations in regard to the account of Dobbins & Dazey. (R. 64.)

The court continually suggested to the jury that if the cashier acted unlawfully in respect to the affairs of the bank, the defendant was not entitled to rely upon his statements. Under such an instruction, a cashier or other employe of the bank, who is charged with not having diligently performed the duties devolving upon him by the Banking Act, is not to be credited or believed by the president or other superior officer of the bank. This is not the law.

*Briggs v. Spaulding*, 141 U. S. 132-155.

Counsel for the Government concede, on page 102 of their brief, that "dealing in stocks" is not expressly prohibited by the statute to national banks. A prohibition, however, is inferred or implied, on account of the failure to grant the power.

*First Nat. Bank v. Nat. Exchange Bank*,  
92 U. S. 128.

By the remarks of the court and its action commented upon, in our view, the rights of defendant below were not only greatly prejudiced, but flagrantly violated. After such remarks and such instructions, there was no opportunity for counsel for defendant below to convince the jury by argument that in certifying the checks described in the indictments, Mr. Spurr had information from the cashier, upon which he relied in good faith, that a sufficient amount had been deposited and was in the bank to cover the checks certified, unless the jury first found that the collateral transactions of 1886-7 never occurred.

The following instruction of the court was of little purpose or benefit to the defendant below, if the statements of the cashier could not be relied upon, if it appeared to the jury from the

transactions of 1886-7 such cashier had violated the by-laws of the bank or the statutes :

“If you find ‘that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank to cover the check certified,’ I add : in addition to the existing overdraft—‘he would not be guilty under the indictment, and you should acquit him.’” (R. 152.)

The court assumed that if in the transactions of 1886-7 the cashier acted in violation of the by-laws of the bank or the statutes, Mr. Spurr had no right to rely upon the statements of the cashier, and therefore, having no right to rely upon the statements of the cashier, the jury must of necessity have disregarded all of the evidence offered by defendant below that in certifying the checks he relied upon the representations of the cashier in good faith. The court in substance said to the jury that there could be no reliance by defendant below upon the cashier in good faith on account of the alleged transactions of 1886-7, which were proved by the Government over the objections of the defendant below.

## II.

**THE WORD "WILLFUL," AS USED IN SECTION 13 OF THE ACT OF CONGRESS OF JULY 12TH, 1882, ERRONEOUSLY OMITTED FROM THE DESCRIPTION OF THE OFFENSE IN THE CHARGE OF THE TRIAL COURT.**

In our former brief we contended that the trial judge, in defining the offense charged against the defendant, omitted to properly instruct the jury concerning the word "willfully," as used in § 13 of the act of July 12, 1882. The learned counsel representing the Government in their brief insist that the court "instructed the jury that the certification of the checks must have been done willfully, designedly, and in bad faith." In our view, this assertion is not supported by the record. *The word "willfully" was not used by the trial judge concerning any affirmative act of the defendant in the certification of the checks.* "Willfully" was used by the court in its charge, but only in emphasizing negative conduct of the defendant, not affirmative action on his part. The court, in its instructions to the jury, said :

"If the proof fails to satisfy to your mind clearly and beyond a reasonable doubt that the defendant did actually know at the time he certified the checks mentioned in the indictment that

Dobbins & Dazey did not have on deposit in the bank sufficient funds and credits to meet the checks so certified, then you should acquit him, unless you are convinced by the proof beyond a reasonable doubt that he willfully, designedly, and in bad faith (these words mean substantially the same thing) *shut his eyes to the fact, and purposely refrained from the inquiry or investigation for the purpose of avoiding knowledge.*" (R. 153.)

The court also said in its charge to the jury :

"If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the dates of the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient, or more than sufficient, to cover the amount of said checks, besides the overdrafts already existing, then he is not guilty, and you should acquit him, *unless ignorance of the overdrafts was willful, as elsewhere explained in the court's instructions.*" (R. 152.)

The court used the word "willful" twice in the parts of the charge quoted, *but it did not instruct the jury that the Government was bound, in order to maintain the indictments, to prove that the defendant*

*willfully, designedly, and in bad faith certified the checks described in the indictments; therefore, the word "willful" was, as we contend, erroneously omitted from the description of the offense in the charge to the jury.*

"Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of that fact, or without any purpose to evade or disobey the mandates of the law."

*Potter v. United States*, 155 U. S. 155.

The significance of the word "willful" in the criminal statutes has been considered by this court. In *Felton v. The United States*, 96 U. S. 699-702, it was said :

"Doing or omitting to do a thing 'knowingly and willfully' implies not only a knowledge of the thing, but a determination with an evil intent to do or to omit doing it. The word 'willfully,' says Chief Justice Shaw, in the ordinary sense in which it is used in statutes, means not merely 'voluntarily,' but with a bad purpose. (28 Pick. 220.)

" 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' (1 Bishop Cr. Law, §428.) "

*Potter v. United States*, *supra*.

We call attention to the evidence offered by the Government of the collateral transactions of 1886-1887, and to the remarks made to the jury con-

cerning the same. (R. 56-61.) Also to the refusal of the court to charge the jury that if the defendant relied in good faith upon the statements of the cashier as to the condition of Dobbins & Dazey's account, believing those statements to be true, he would have the right to do so "if the cashier was reputed to be, and believed by the defendant to be a man of honesty and truth. (R. 64.) *The court insisted upon striking out the word "truth," and substituting, "right conduct as respects the affairs of the bank."* Therefore, under the instruction of the court, if the cashier was believed by the defendant "to be a man of honesty and truth," the defendant had no right to rely upon his statements; he could only rely upon them "if he was a man of honesty and right conduct as respects the affairs of bank," the court having already remarked in the presence of the jury that the transactions of 1886-1887 were admissible as affecting the defendant's right to rely on the representations made by the cashier. (R. 56.)

The court charged the jury :

"The Government is bound, in order to maintain any of the counts in these indictments, to prove :

"First, that the defendant certified the check.

"Second, that the drawers of the check had

not sufficient funds in the bank to meet such check.

"Third, that the defendant knew that there were no funds of the drawer in the bank sufficient to meet them. This last element of the offense charged will be explained, and its modification stated, further on." (R. 148.)

When the court gave that part of the charge, it should, at the same time, have called the attention of the jury to the language of § 13 of the act of 1882, imposing the penalty upon one "*who shall willfully violate § 5208 of the Revised Statutes.*" At least, the court should have carried out its expressed intention of explaining "the last element of the offense," as the word is defined and explained in *Potter v. United States, supra*. Instead of explaining and modifying "the last element of the offense" further on in its charge, the trial court, in our view, never directly charged the jury that to willfully certify a check meant *not merely that the defendant certified the check when sufficient funds were not in the bank, but that he certified it "willfully," that is, with a bad purpose — with an evil intent, without justifiable excuse.*

The court did not directly charge the jury, in referring to the affirmative act of defendant certifying the check, *that the word "willfully" "im-*

*plied on the part of the defendant knowledge and a purpose to do wrong,"*—a determination with bad intent to commit the wrong.

*Potter v. United States, supra.*

The defense of the defendant was, that he was not a bookkeeper; that he had no practical knowledge of bookkeeping; that he gave his attention to working up custom and patronage; and that he had no knowledge, at the time of the certification of the checks, that the drawers thereof had not sufficient funds on deposit in the bank to meet them, but, on the contrary, that he had

the time, information from the cashier and a clerk of the bank that the drawers had ample funds on deposit to meet the checks, and that he honestly relied upon this information in certifying the same. Therefore, instead of defining the offense within § 13 of the act of 1882, early in the charge the trial judge observed to the jury, that "this last element of the offense" (knowledge), would be explained and its modification stated further on.

Soon after, the court said in its charge :

"Taking this evidence up in detail, it is not denied that the defendant certified these checks; and, secondly, that the account of the drawers

was overdrawn when these certifications took place; but, third, the defendant asserts that he was not cognizant of the fact that the account of the drawers was overdrawn at the time of his certification of the checks." (R. 148.)

"These checks before their certification, were not obligations of the Commercial National Bank; they were made such by the act of the defendant in certifying them to be good; by that act his bank was estopped to deny its obligation to the other banks which held them. *It was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn. From the existence of such a duty you may draw an inference of fact that he did so inform himself, if he did not already know it.* But the presumption of knowledge is not an absolute one, and the defendant may show, if he can, that he did not, in fact, acquire information of the truth. And in general, if the defendant acted in good faith in making these certifications, believing that the state of the account of Dobbins & Dazey justified it, he is not guilty of the offense charged. Mere negligence or carelessness unaccompanied by bad faith, would not render him guilty." (R. 149-150.)

Further on the court said:

*"But I further charge you, that the president is a general officer of the bank, and it is admitted that he had authority, notwithstanding these by-laws, to certify checks; and when the president assumed to*

*certify these checks as good, the faithful and honest discharge of his duties required him to be informed of the condition of the account on which they were drawn."* (R. 151.)

Our contention is, that instead of explaining "this last element of the offense," referred to near the opening of the charge, the court not only omitted so to do, but gave erroneous instructions thereof. Clearly these instructions were calculated to mislead and confuse the jury. These parts of the charge, we insist, are applicable only to civil responsibility, and are not applicable to an offense charged under § 13 of the act of 1882. Section 5208 of the Revised Statutes, "carries with it no penalty against the wrong-doing officer."

*Potter v. United States, supra.*

The presence of the word "willful" in said section means something.

"While it is true that care must be taken not to weaken the wholesome provisions of the statute designed to protect depositors and stockholders against the wrong-doings of banking officials, it is of equal importance that they should not be so construed as to make transactions of such officials, carried on with utmost honesty and in a sincere belief that no wrong was being done, criminal offenses."

*Potter v. United States, supra.*

"As willful wrong is the essence of the accusation," the charge of the court should have directed the jury to the willful violation of the statute; and in explaining the "last element of the offense," the trial court should have charged the jury that the defendant, in certifying the checks, knew that there were no funds of the drawers in the bank sufficient to meet them, and willfully certified the same with a bad purpose,—with an evil intent, without justifiable excuse. Instead of explaining the "last element of the offense" within the terms of said § 13 of the act of 1882, as construed in *Potter v. United States*, *supra*, the instructions given shifted the burden of proof of the Government upon the defendant, because if "it was the defendant's duty before certifying the checks, if he was not informed, to inform himself of the state of the account on which they were drawn," and if, "from the existence of such a duty you may draw an inference of fact [in a criminal case] that he did so inform himself, if he did not already know it," then the jury, upon the proof of the Government that defendant had, as president of the bank, certified the checks, and that the drawers of the

checks had not sufficient funds in the bank to meet the same, must necessarily have convicted defendant under said § 13 of the act of 1882, because it was his duty before certifying checks to inform himself of the state of the account on which they were drawn; and from the existence of such duty, the jury might draw the inference of fact that he did so inform himself. Under such a charge, an officer of a bank, who voluntarily certifies a check, where the drawer thereof has not sufficient funds in the bank to meet the same, may be convicted without any other proof tending to show that he "willfully violated the provisions of § 5208 of the Revised Statutes"; *i. e.*, that he certified the check with a bad purpose,—with an evil intent, without justifiable excuse. In brief, that he is guilty of "a willful wrong. This is the essence of the accusation." We contend, as we did in our former brief, that the court erroneously applied to the defendant, in its charge to the jury, the rules and principles of civil, and not those of the criminal responsibility.

"Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation, for what a man is bound to know, he shall be held to have

known, but that has no place at all when a man is charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you can convict."

Vice-Chancellor McCoun, in *Scott v. Depeyster*, 1 Edw. Ch. 513.

*Briggs v. Spaulding*, 141 U. S. 162.

In the last case, the Chief Justice, speaking for this court, observed :

"They [the subordinates] must be supposed to act honestly until the contrary appears, and the law does not require their employers to entertain jealousies and suspicions without some apparent reason."

It is true that the trial judge charged the jury that the Government must establish the defendant's knowledge of the state of Dobbins & Dazey's account beyond a reasonable doubt ; but, in view of his remarks and his instructions concerning the evidence of the collateral matters of 1886-1887, the jury evidently believed that he had no right to rely upon the statements of the cashier concerning such account, if those transactions referred to were believed. As the trial court charged the jury "that it was the defendant's duty, before certifying the checks, to inform himself fully

of the state of the account on which they were drawn, and that from the existence of such duty the jury might draw an inference of fact that he did so inform himself," and as it was not denied that the account of the drawers was overdrawn when the certifications took place, of necessity, under such a charge, the jury would believe that the Government had established the defendant's guilty knowledge of the state of Dobbins & Dazey's account, beyond a reasonable doubt.

The Court of Appeals cites in support of its opinion upon this point, *Insurance Company v. Pendleton*, 115 U. S. 339-344; *Finn v. Brown*, 142 U. S. 71; and *Agnew v. United States*, 165 U. S. 36-49.

*Insurance Company-Pendleton, supra*, was a civil action, and the discussion therein of the duties of the officers of a bank has no application whatever to a criminal liability.

*Finn-Brown, supra*, was also a civil action to enforce an individual liability against a stockholder, and recover a fraudulent dividend. No question of criminal law or of criminal responsibility is discussed therein.

*Agnew-United States, supra*, was an appeal from a conviction for violation of § 5209 of the Revised Statutes. The facts were very different from the case at bar, and we cannot find language in the opinion handed down supporting the theory that in a criminal action under § 13 of the act of 1882 from the existence of an official duty, a jury may draw an inference of guilty knowledge, of bad faith, of an evil intent without justifiable excuse. (See R. 130.)

In that case it was expressly stated :

“Undoubtedly, in criminal cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial.”

In view of the extensive remarks of the trial court concerning the principles of civil responsibility, we contend that not only was the charge erroneous in the parts referred to, *but that, in any event, this court must declare the same misleading and confusing.*

*Dow v. United States*, 49 App. 606. (82 Fed. Rep. 904-8).

*Coffin v. United States*, 156 U. S. 432-463.

In the opinions handed down in the last cases cited, the misleading and confusing nature of a charge is commented upon.

We insist that, not only did the trial court omit to explain properly and sufficient "this last element of the offense," but that the explanation or modification thereafter given tended to relieve the Government of the burden of showing direct knowledge—guilty knowledge—a bad purpose—evil intent on the part of the defendant in certifying the checks. The jury was permitted to find a verdict of guilty upon inferences on account of a duty of the defendant from a constructive knowledge, because he was an officer of the bank, and was therefore bound to know the condition of the bank, and the accounts of depositors, or at least, the account of Dobbins & Dazey, at the time he certified their checks.

In order to charge an officer with doing an act criminally, which he knows to be false, some fact or circumstance must be proven that it was in bad faith, willful, or for some fraudulent purpose.

*Pierce v. Hanmore*, 86 N. Y. 103.

*Stebbins v. Edmunds*, 12 Gray, 203.

*State v. Massey*, 97 N. C. 465.

*United States v. Ross*, 92 U. S. 281.

See also, the other authorities cited in our principal brief.

That the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial, see —

*Agnew v. United States*, 165 U. S. 49.

*Lilienthal's Tobacco v. United States*, 97 U. S. 266.

*Stokes v. People*, 53 N. Y. 164.

*People v. Millard*, 53 Mich. 70.

*People v. Fairchild*, 48 Mich. 32-37.

*Wharton v. State*, 73 Ala. 368.

*State v. Conway*, 55 Kansas, 323, where it was held that "An instruction which inferentially places the burden of proof upon the accused," is *erroneus*.

In *Briggs v. Spaulding*, 141 U. S. 132, it was remarked in reference to the conduct of the president and directors of a bank, that "Their conduct is to be judged not by the event, but by the circumstances under which they acted.

See also, *Wakeman v. Daley*, 51 N. Y. 27-32.

*Murray v. Nelson Lumber Company*, (Sup. Ct. Mass.) 9 N. E. Rep. 634.

We again call attention to what occurred when the jury, after deliberating some hours, returned and handed to the court a paper reading: "We want the law as to the certification of checks when no money appeared to the credit of the drawer." (R. 53-4.) (Former brief, pp. 96-103.)

Thereupon, the court read a part of § 5208 of the Revised Statutes, and then inquired of the jury, "Does this answer your question?" The foreman said, "Yes, sir." The court again read a part of said § 5208, and made the following, among other, comments:

"I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that the obligation of the bank to meet it in such case is made so by the act of the officer who certifies it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there is no funds there to meet it.

"You understand what I have said now is to be taken in connection with what I have before instructed you." (R. 53.)

As the jury were retiring, counsel for defendant said to the court that he thought what the jury wanted was the act of 1882, making it a misdemeanor to willfully violate the section of the Revised Statutes which the court had read to

them, and that the court ought to read and explain that act to the jury. The court asked if counsel referred to the act prescribing the penalty for false certification, and on being answered in the affirmative, stated that the jury had nothing to do with that. (R. 54.)

In defense of the action of the trial judge in reading twice § 5208 of the Revised Statutes, and in refusing, as requested by counsel for defendant, to read in connection therewith § 13 of the act of 1882, counsel for the Government observe in their brief on page 97 that "The jury did not ask for the law prescribing the penalty for false certification, because it was no part of their function to fix the penalty. The court, therefore, properly declined to read that law to them." Counsel for the Government, therefore, contend that the remark of the trial judge, "that the jury had nothing to do with that" (§ 13 of the act of 1882), was properly made.

Without the act of 1882, the defendant could not have been indicted or convicted under any statute of the United States. This court has said that the presence of the word "willful" in said § 13 of the act of 1882 "cannot be regarded as

mere surplusage; it means something more. It implies on the part of the officer knowledge and a purpose to do wrong. Something more is required that an act of certification made in excess of the actual deposit, but in ignorance of that fact or without any purpose to evade or disobey the mandates of the law."

*Potter v. United States, supra.*

The defendant was being tried for having "*willfully*" violated certain provisions of the statute. It goes without saying, that the word "willful," embraced in the act of 1882, must have been discussed before the court and jury in the argument of counsel. Indeed, in the opening statement of counsel for the Government to the jury, he said he expected to prove "that Spurr certified the checks of Dobbins & Dazey willfully or with bad intent to injure the bank." (R. 54.)

Evidently the jury in making the request they did, wanted to be further instructed concerning the law as to the certification of checks where there were no funds of the drawer in the bank adequate to meet the same as applicable to the case upon trial. It does not appear to us that the answer of the counsel for the Government

or of the Court of Appeals that "the assumption is negated by the answer of the jury," is sufficient. (R. 117.) The jury asked the trial judge for an instruction in a matter of law, and it was the duty of the judge to instruct them correctly. As § 5208 of the Revised Statutes was read twice, § 13 of the act of 1882 ought to have been read in connection therewith. It will not suffice to reply of § 13, as the trial court did in the presence of the jury, that as that act prescribes the penalty for false certification, the jury had nothing to do with it.

In this case, the jury had very much to do with that act. While the act imposes a penalty, it also embraces the word "willfully," and therefore under that act, on account of the word "willfully," a party can be convicted only, who willfully does an act therein referred to. *As "willful wrong is the essence of the accusation," the jury had very much to do with that act when properly expounded to them by the trial judge.* The fact that the foreman in answer to the question of the judge said, "Yes, sir," (R. 53,) does not cure the error we complain of.

All persons familiar with the trial of causes in the courts—especially in the Federal courts—

have had occasion to observe with what attention a jury listens to catch from the court the slightest indication of its views. This is particularly the case when matters of great doubt and difficulty are before them for decision. How, then, can it be known that the expression referred to of the trial judge, "that the jury had nothing to do with that" (meaning § 13 of the act of 1882), had not some influence in determining the final result? The more able and upright the court, the more likely are its intimations to have weight, and it is impossible to say that the jury may not have received their bias from the court's reading twice § 5208 of the Revised Statutes, and then, when requested so to do, failing to read and explain § 14 of the act of 1882.

Undoubtedly, after the trial judge had read to the jury § 5208 of the Revised Statutes, and then asked the jury, "Does this answer your question?" the foreman would have thought it were contemptuous for him to reply "No." The jury had asked the question of the learned trial judge; the court had given an answer thereto, and as a matter of course the foreman accepted that as correct, and said "Yes, sir."

As was said in our principal brief, whether the trial judge satisfied the jury or not is wholly immaterial. The question is, Did his instruction satisfy the law? We say it did not.

Again, after the trial judge had twice read to the jury § 5208 of the Revised Statutes, he further remarked, as already quoted :

“I charge you, in addition to the instructions I gave you this morning, that a check drawn upon a bank, where the drawer has no funds, creates no obligation until it is certified as good by an officer of the bank, and that makes the check good as to the holder of it, and the bank then becomes estopped, although there was no warrant for the drawing of the check, as against the *bona fide* holder. So that, the obligation of the bank to meet it in such case is made so by the act of the officer who certified it to be good. That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there is no funds there to meet it.

“You understand what I have said now is to be taken in connection with what I have before instructed you.” (R. 53.)

About the conclusion of the above remarks is the following :

*“That is what is meant by false certification. It is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.”*

These were nearly the last words that fell upon the ears of the jury when they were retiring for the second time to consider their verdict. They had deliberated some hours before, had returned to the court-room for additional information, and then were told by the trial judge in substance, "*that false certification is the certifying by an officer of a bank that a check is good when there are no funds there to meet it.*" This is not the law, and the jury must have been misled thereby.

It is true that the trial judge also remarked, "You understand what I have said now is to be taken in connection with what I have before instructed you," and therefore, it is insisted on page 87 of the brief of counsel for the Government, that "it is impossible for the jury to have supposed that the court on the occasion referred to intended to instruct the jury that the mere certifying by an officer of the bank when there are no funds there to meet it, constituted an offense under the statute."

In answer, we quote from *Horne v. State*, 1 Kan. 42-73, as applicable :

"It was urged in argument that the court had in other parts of the charge given the true rule of law as applicable to this point, but as this was

a separate charge, it is impossible for us to say that it was not the controlling one with the jury. . . . We are not insensible to the consideration that the court, having once ably and clearly given the true law, the probabilities are that little of essential injury may have been sustained by the defendant by this misdirection. But we have no right to consider probabilities in reference to a single case when called upon to apply the general principles of established law and to register a precedent for the future actions of courts."

*In the case at bar, however, we do not concede that the trial court gave the correct law in its charge to the jury. Therefore, in this case we insist the fair conclusion is, that the language of the trial judge about false certification as last stated by him was not only controlling with the jury, but was the direction to the jury which caused the verdict of "guilty" to be rendered.*

## III.

**DEFENDANT OFFERED EVIDENCE THAT HE HAD NO KNOWLEDGE OF THE OVERDRAFT OF DOBBINS & DAZEY AT THE TIME HE CERTIFIED THE CHECKS, AND YET THE TRIAL COURT REFUSED AN INSTRUCTION COVERING HIS THEORY OF THE CASE, SUPPORTED BY POSITIVE EVIDENCE.**

Defendant prayed the court to give the following special instruction, being the fifth of its requests :

“ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks, then he is not guilty, and you should acquit him.” (R. 50, 51.)

Which instruction the court declined to give, but modified it by adding certain words, and gave it as thus modified (the added words appearing in brackets), as follows :

“ If you find from the proof that the account of Dobbins & Dazey upon the books of the bank was overdrawn continuously during the period covered

by the checks certified by the defendant, and that the defendant was in fact ignorant of such overdraft; and that he certified the several checks mentioned in the indictment, believing at the time that the exchange deposited by Dobbins & Dazey on the days upon which said checks were certified was sufficient to cover the amount of said checks [ besides the overdraft then existing ], then he is not guilty, and you should acquit him [ unless such ignorance of the overdraft was willful, as elsewhere explained in the court's instructions ].” (R. 51.)

To the modification by adding the words “besides the overdraft then existing,” the defendant duly excepted. (R. 152.)

The instructions given and refused are placed side by side for comparison in our former brief, on page 91 thereof. The modification, “besides the overdraft then existing,” in our view was erroneous and misleading.

The verdict was decided by the trial judge to be applicable to “a check certified by the defendant, dated January 3, 1893,” and the defendant was sentenced for two years and six months to the penitentiary for the false certification of that check. (R. 8.)

The undisputed evidence shows that Dobbins & Dazey deposited upon that day in the Commercial

National Bank \$79,941.25, and they only checked out \$40,551.50. (R. 28, 147.) The check of Dobbins & Dazey certified to on January 3, 1893, was for \$40,000. (R. 147.)

The instructions prayed for, among other things asked the court to direct the jury :

“And that, having no knowledge of the overdraft of Dobbins & Dazey’s account in the bank, the defendant had in mind the course of business as he understood it to be, and supposed and believed they were making such daily deposits of New York exchange and then drawing against them, and that in each instance where he certified a check he had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, he would not be guilty under the indictment, and you should acquit him.”

As given, the instruction was as follows :

“If you find that in each instance where he certified a check the defendant had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited that day and was in the bank, to cover the check certified, in addition to the existing overdraft, he would not be guilty under the indictment, and you should acquit him.”

The defendant was entitled to have an instruction to cover his theory of the case upon the affirmative evidence introduced by him in support thereof. Under the evidence given in his behalf, the modification of the instruction prayed for by adding thereto "in addition to the existing overdraft," must necessarily have impressed the jury prejudicially against the defendant.

If the defendant, when he certified the check of \$40,000 on January 3, 1893, had information from the cashier or exchange clerk, upon which he relied in good faith, that a sufficient amount had been deposited by Dobbins & Dazey that day and was in the bank to cover the check certified, he clearly would not be guilty under any construction of § 13 of the act of 1882. The defendant had testified that he had no knowledge of the overdraft of Dobbins & Dazey, and yet, having given that testimony, he was refused an instruction by the trial court which covered the facts of the case as testified to. In effect, the instruction, as modified, informed the jury that the defendant, in order to be innocent, must have seen that provision was made for the overdraft, although he had testified he was directly ignorant of it. The instruction directed the jury, in substance,

that the defendant was only entitled to acquittal in the event that the deposit amounted to the check certified and the overdraft existing upon the books, whether he knew of the overdraft or not. It held him to the knowledge of the overdraft, although the jury should find that he had no such knowledge actually, and although such knowledge could not be imputed to him from his "shutting his eyes to the facts," etc., as stated by the court.

As we view it, the modification of the instruction by the trial judge makes absolute the inference of defendant's knowledge of the state of the account, which the court elsewhere instructed the jury they might find from his duty to know it; and this, too, though the jury should find that he had no such knowledge and was otherwise not chargeable with such knowledge.

The Court of Appeals, in the opinion handed down, said :

"The purpose of the modification was to preclude such a misconception of the defendant's duty, and to bring the request into harmony with the statute and the general charge definitive of that duty." (R. 116.)

The language of the Court of Appeals is not

satisfactory to us on this point, and we think does not express a correct view of the law. *It seems to us that it overlooks the well-recognized rule that where positive evidence is offered upon the trial in support of the defense relied upon, the defendant is entitled to have an instruction embracing the law applicable to such evidence, leaving to the jury the weight to be given to the evidence.* (R. 126-144.)

## IV.

**VERDICT UNCERTAIN AND INSUFFICIENT.**

The form of the verdict rendered was: the jury "upon their oaths do say that they find the defendant guilty as charged in the indictment upon the last three certified checks in the indictment, and recommend him to the mercy of the court." (R. 5.)

Thereon the court sentenced the defendant upon a check dated January 3d, 1893. (R. 8.)

A motion in arrest of judgment was filed, argued, and submitted. (R. 6.)

The defendant was tried before Judge SEVERANCE, for falsely certifying four checks. (R. 147, 148.)

Counsel for the Government refer to the verdict on page 128 of their brief, and attempt to give a construction thereof embracing several pages of the brief. (R. 129-133.)

The indictments contained several counts. The motion of the United States District Attorney asked "for sentence upon the verdict of the jury heretefore rendered, upon count No. 2 of indictment No. 7994, count No. 2 of indictment No. 8139, counts Nos. 1 and 4 of indictment No. 7994,

count No. 3 of indictment No. 8139, count No. 2 of indictment 8078, and count No. 5 of indictment No. 8139." (R. 7.)

Indictment No. 7994 had more than one count, and indictment No. 8139 had several counts. The court seems to have selected count 3 of indictment No. 8139 upon which to render sentence. In the construction of this verdict, the counsel for the Government contend that "on the three last certified checks" is superfluous, and should be stricken out of the verdict. We quote as follows from the brief of the Government :

"THE VERDICT IN THIS CASE.

"*'We, the jury, find the defendant guilty, on the three last certified checks, and recommend him to the mercy of the court.'*

"The words *italicized* constitute a general verdict of guilty on all counts. (160 U. S. 197, *Bal-  
lew v. United States* ; 157 U. S. 279, *Statler v.  
United States*.)

"The words in parentheses are 'superfluous,' and striking them from the verdict leaves it in all respects complete and responsive to the charge. (157 U. S. 279, *Statler v. United States*.)

"The words 'as charged in the indictment' would have been supplied by construction. (157 U. S. 279, *Statler v. United States* ; 154 U. S. 154, *St. Clair v. United States*.)

"The words in parentheses, while *superfluous*

*in law*, are suggestive or advisory, to the court, as to the punishment."

Counsel seemed to think it necessary to strike out "on the three last certified checks," to make the verdict read definite and certain. But this construction is a strained one. We cannot ignore "the three last certified checks" contained in the verdict. We might as well ignore the word "guilty" as the words "on the three last certified checks."

An examination of the citations does not support the construction attempted to be given to the verdict. In *Ballew v. United States*, 157 U. S. 160-197, the defendant was charged "with wrongfully withholding from a pensioner of the United States part of a pension allowed and due her," and also for "demanding and receiving as agent greater compensation for services than is provided by the Revised Statutes." The verdict was a general verdict. In that case, the court held that there was error as to the conviction of the defendant of one of the offenses charged, but there was no error in the conviction upon the other. In that case, the general judgment of the court below was reversed by this court, and the case remanded

with instructions to enter judgment upon the second count of the indictment.

In *Statler v. United States*, 157 U. S. 279, the verdict was "guilty in the first count for having in possession counterfeit minor coin." This court held the verdict to read "guilty in the first count," and ignored "for having in possession counterfeit minor coin." There were several counts in the indictment, and the court very properly ruled that the verdict of the jury applied only to the first count. But if the construction to the uncertain verdict in this case be given, as contended for on page 131 of the brief of the Government, then the verdict of the jury would be construed as making the defendant guilty upon all the counts of the indictments under which he was tried. This is not a fair construction, nor a proper one.

In *St. Clair v. United States*, 154 U. S. 1002, this court held "that on an indictment for murder, a verdict of guilty is sufficient as referring to the single offense charged." This and nothing more.

Therefore, an examination of the authorities cited at the bottom of page 131 and at the top of page 132 of the brief of the Government will not,

in our view, sustain the argument that the words in the verdict "on the three last certified checks," must be wholly ignored. With these words retained in the verdict, there is difficulty in deciding definitely which of the checks described in the various indictments the jury referred to in the verdict.

In indictment No. 8139, the check of January 3d, 1893, is in the third count. Yet there are several other counts in the same indictment. It is evident from the lengthy discussion of the verdict by the learned counsel representing the Government, that such verdict is not definite and certain upon its face, and therefore a labored effort is made in several pages of their brief to construe the same. If the verdict is not sufficiently certain upon which to render the sentence complained of, then of course defendant's motion for arrest of judgment should have been sustained. (R. 6.)

The charge of the United States Circuit Judge appears on pages 146-157 of the record. The opinion of the United States Circuit Court of Appeals, handed down June 1st, 1898, is printed on pages 104-123 of the record. The argument

and authorities presented on behalf of the defendant in error for a rehearing in the Court of Appeals appears in the record on pages 124-144.

This brief is supplemental to our principal brief, and is to be read and considered in connection with that brief and with the authorities there cited.

Respectfully submitted.

ALBERT H. HORTON,

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MARCH 8, 1899.